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NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

ALABAMA BOARD OF PARDONS AND
PAROLES, EALON M. LAMBERT, JOHN
THOMAS PORTER, and RAY MORROW,
Members of the Board of Pardons
and Paroles of the State of
Alabama, and the
STATE OF ALABAMA,

PETITIONERS,

vs.

RICHARD MARK ELLARD,

RESPONDENT,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OF

DON SIEGELMAN
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

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EDITOR'S NOTE

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QUESTIONS PRESENTED

The Alabama Board of Pardons and Paroles, the members thereof, and the State of Alabama, Petitioners, respectfully pray that a writ of certiorari issue to the Honorable United States Court of Appeals for the Eleventh Circuit to review the following questions:

1. Where a state convict is serving concurrent life sentences from two states in the prisons of one state and is then issued a parole, which has no effect on the prisoner or his sentences, except to transfer him to the other state's prisons, does such a parole create any constitutionally pro-tected liberty interest?

2. To what extent do state parole statutes, as authoritatively interpreted by state courts, control the nature of

state paroles and the validity of a given parole and to what extent are state court interpretations of such statutes binding on the federal courts?

THE PARTIES

In the United States District Court for the Middle District of Alabama and the United States Court of Appeals for the Eleventh Circuit, the parties were: The Petitioners herein, to wit, the State of Alabama, the Alabama Board of Pardons and Paroles and the members thereof, and the Respondent herein, to wit, Richard Mark Ellard.

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OPINIONS AND ORDERS BELOW

The opinions and orders of the United States District Court for the Middle District Court of Alabama are not reported but are submitted as Appendix "A" to this petition.

The opinion and orders of the United States Court of Appeals for the Eleventh Circuit are reported as follows:

Ellard v. Alabama Board of Pardons and Paroles, 824 F.2d 937 (11th Cir, 1987)

and

Ellard v. Alabama Board of Pardons and Paroles, ___ F.2d ___ (11th Cir, Sept. 24, 1987)

The same are submitted as Appendix "B" to this petition.

JURISDICTION

The decision of the United States Court of Appeals was issued August 19, 1987; your petitioners' application for rehearing, suggesting in banc consideration, was denied on September 24, 1987. The mandate is now stayed until November 24, 1987, or until the dispostion of this petition. See Appendix "B".

This Honorable Court's Jurisdiction is invoked under Title 28, Section 1254(1), United States Code.

CONSTITUTIONAL PROVISIONS INVOLVED

At issue in this case is an Alabama Parole which caused the Respondent, who had been serving concurrant Alabama and Georgia life sentences in Alabama's prisons, to be transfered to Georgia's prisons to continue serving the sentences there; the issue is whether such a parole created a liberty interest within the meaning of Section 1 the Fourteenth Amendment to the Constitution of the United States, relevent language reading:

> "... Nor shall a state deprive any person of ...liberty... without due process of law..."

STATUTORY PROVISIONS INVOLVED

At issue in this case is whether the

United States Court of Appeals was authorized to reject the State Court construction of Alabama's parole statutes. These statutes are voluminous and are set out in Appendix "C".

STATEMENT OF THE CASE

Alabama law provides for parole is the case of most prison sentences. See the statutes set out in Appendix "C". The decision to parole is entirely withing the descresion of the Board of Pardons and Paroles, and, therefore, the statutes create no liberty interst in being paroled. Thomas v. Sellers, 691 F.2d 487 (11th Cir, 1983), cited with approval for this proposition by the panel in this case, Ellard v. Board, 824 F.2d 937, 942 (11th Cir, 1987). However, the Board's descresion in granting paroles is severly restricted by the state statutes. Before it is authorized to grant any parole the Board must

obtain, "...a complete statement of the crime...", for which the prisoner was sentenced, which is to include, "...the circumstances of such crime...." (15-22-25 Code of Alabama, 1975; Appendix "C".) The Board is also to obtain any available reports of the prisoner's "...mental and psychiatric condition and history...." (Ibid) and a "...complete criminal record of such prisoner...." (Ibid)

Having amassed this data, the Board in its discretion may conditionally release to the free world a parolable prisoner, who is not subject to detainer, if the Board determines that there is a reasonable probability that the prisoner will live "... at liberty without violating the law and that his release is not imcompatible with the welfare of society...." 15-22-26; Appendix "C". The Board must also be satisfied that the

prisoner will be suitably employed in self sustaining employment and will not become a public charge. §15-22-28(d); Appendix "C".

Alabama prisoners, who are subject to detainers may be paroled to the detainers. However, if such a prisoner satifies all of his detainers before completing his Alabama sentence, he may not be released from custody without an appropriate order from the Board. Section 15-22-24(i); Appendix "C".

The nature of an Alabama parole is set out in Section 15-22-26, Code of Alabama, 1975:

> "...If the board shall so determine, such prisoner shall be allowed to go upon parole outside of prison walls and enclosure upon such terms and conditions as the board shall prescribe, but to remain while thus on parole in the legal custody of the warden of the prison from which he is paroled until the expiration of the

maximum term specified in his sentence or until he is fully pardoned..." (Appendix "C")

The duties of the Board are mandatory, but its powers are strictly construed. Section 15-22-38; Appendix "C". A member of the Board who knowingly or willfully neglects or fails to perform as required, commits a felony. Section 15-22-39; Appendix "C". Any parole granted contrary to the provisions of the statutes, is null and void. Section 15-22-40; Appendix "C".

Prior to March 2, 1981, the Respondent, Richard Mark Ellard, was serving concurrent Alabama and Georgia life sentences for two different murders. He was serving these sentences in Alabama's prisons. On March 2, 1981, the Board issued a certificate of parole to Ellard, which placed Ellard in the custody of the State of Georgia, to

continue serving his Alabama and his Georgia sentences in Georgia prisons. Since Ellard was being transferred to Georgia's prisons, no provision was made for him to maintain employment or report to a parole supervisor, but he was required to report to the Board, if he was ever released by Georgia. Pursuant to the parole, he was transferred to Georgia's prisons to continue serving both states' sentences there. (R. Vol. I, D.5, R.Ex.A, pp. 22-23)

Within weeks of the parole, it became apparant that the Board may not have had before it the materials required by the Alabama statutes before any parole may be issued, when it issued the Ellard parole. The Board ordered an investigation and, when this investigation revealed gross deficiencies in the

materials before the Board[1], the Board obtained temporary custody of Ellard from Georgia in order to hold hearings in accordance with Morrisey v. Brewer, (408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 [1972]). After such hearings, the Board nuffified the parole. Respondent Ellard was then returned to Georgia's prisons to continue serving both of his sentences there, and he remains there and will remain there until and unless Georgia moves to release him.[2] (R. Vol. I, D.5, R. Ex "A," pp 2-10)

Respondent Ellard obtained review of the Board's action by a civil action in

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[1]See Appendix "E". Compare parts I, II and III with part IV. These deficiencies will be outlined in the Statement of the facts.

[2]It is an undeniable fact that Ellard's situation before the nullification and his situation thereafter were identical. For this reason the State of Alabama has argued throughout this litigation that Ellard's claim is moot.

the nature of common law certiorari in the Circuit Court of Montgomery County, Alabama. On August 31, 1983, the Circuit Court, after reviewing the records of the Parole Board, affirmed the Board's action in nullifying the parole. Circuit Judge H. Mark Kennedy wrote in part:

> "...In the instant case which is before this Court for review, it is apparent from the record that at the time Ellard's parole was granted, the Board did not have before it a complete investigative file on the inmate's social and criminal record. For that reason, at the time of issuance, the Board was in violation of §15-22-25(b) of the Code of Alabama.
>
> "Due to the strict construction and mandatory limitations and restrictions language in §15-22-38, the Board is required by law to follow the explicit statutory scheme in performing its functions as parole grantor.

"It is the opinion of this Court that the Alabama Board of Pardons and Paroles failed to fulfill its statutorily mandated function in the issuance of the Ellard parole and for that reason and pursuant to §15-22-40, the parole issued to Ellard was void ab initio..."

(R.Vol.I, D.5, R.Ex. "B", p.3,; emphasis supplied; Appendix "D", pages 103-104)

Ellard appealed to the Court of Criminal Appeals of Alabama, which on June 8, 1984, affirmed the Circuit Court's judgment. (Ellard v. State, 474 So.2d 743 [Ala. Crim. App. 1984]). The Court of Appeals agreed with the Circuit Court that the Board had not complied with the statutory mandates, with the result that the parole was void. (447 So.2d 743, 751-752) However, the Court of Appeals went further and found that the parole was also defective in that:

"...It is apparent from the face of the record that Ellard

did not have suitable employment in self-sustaining employment, and was not free from being a public charge, which are mandatory requirements before parole can be granted. ..." (474 So.2d 743, 752)

Finally, the Court of Appeals ruled that the parole issued to Ellard was nothing more than a conditional interstate prison transfer. The Court wrote:

"...There is no statutory provision specifically authorizing the Board to parole a prisoner to a detainer. If the Board desires to release a prisoner to another state for the purpose of serving a sentence in that state, it is apparent that the proper method is by conditional transfer

under § 15-22-24(i).[3] If the Board in the instant case sought to grant Ellard more than a conditional transfer, its action was in violation of the statute and was void. Regardless of how the Board characterized its action, Ellard obtained nothing more than a conditional interstate transfer. ..." (474 So.2d 743, 753)

Respondent Ellard then sought and was granted review in the Alabama Supreme Court. The State Supreme Court did not

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[3] Section 15-22-24(i) reads:

"(i) The board shall have the power, authority, and jurisdiction to conditionally transfer a prisoner to the authorities of the federal government or any other jurisdiction entitled to his custody to answer pending charges or begin serving a sentence in response to a properly filed detainer from the other jurisdiction. Such conditionally transferred prisoner shall remain in the legal custody of the warden of the institution from which he was transferred. Should any such conditionally transferred prisoner satisfy all detainers against him prior to completion of his Alabama sentence, said prisoner shall not be released from custody without further order of the board of pardons and paroles." (See Appendix C; emphasis supplied)

question anything in the lower courts' opinions but decided a broader question: Whether the Alabama Board of Pardons and Paroles is authorized to revoke an erroneously issued parole. (Ex parte Ellard 474 So.2d 758 [Ala, 1985]) Obviously, a parole issued in violation of the statutes and which is for that reason void, would, at a minimum, be an erroneously issued parole. The Alabama Supreme Court decided the issue in the affirmative, but held that the parolee had the right to due process.[4] The State

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[4]In applying its rule of law to this case, the Supreme Court wrote:

> "...Although Ellard did not have a constitutionally protected liberty interest, nevertheless, we recognize that Ellard was entitled to a due

(cont. next page)

Supreme Court affirmed the lower court's rulings.

Respondent Ellard then sought review by a petition for a writ of habeas corpus in the United States District Court for the Middle District of Alabama, under 28 U.S.C, Section 2254. (R. Vol. I, D.1; Appendix "A".) On May 29, 1986, the

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[4]Continued from page 14:

> process hearing. ..." (474 So.2d 758, 760)

If the Court was applying Federal Constitutional law here, it was wrong. Connecticut Board v. Dumschat, 452 U.S. 458, 69 L.Ed.2d 158, 101 S.Ct. 2460 (1981); Jago v. Van Curen, 454 U.S. 14, 70 L.Ed.2d 13, 102 S.Ct. 31 (1981) If the Court was applying Alabama law, then its ruling is binding as a matter of state law, but the State Supreme Court's finding that Ellard was accorded due process, immediately following the above quoted language is equally binding.

District Court denied the writ on the grounds that Ellard had no liberty interest in the parole and therefore no due process rights. (R. Vol. I, D 1, pp. 23 & 24, Appendix "A") The finding that there was no liberty interest was based on the following findings by the Magistrate, which were adopted by the District Judge.

> "... At the outset, the Magistrate finds that the evidence unquestionably demonstrates that during the period of time involved, Richard Mark Ellard has never been free of prison environments, either in Alabama or in Georgia. When Alabama granted its parole, Ellard did not enter the free world weighted only with parole conditions. When he went to Georgia, he went into the Georgia prison system and again was not priviledged with free-world freedom which is one of the purposes of parole. ..." (Vol. I, D. 20, p. 4 Appendix "A", p. 15)

And,

> "...Ellard's contention of possible freedom in the future, if Georgia paroles him, since Alabama has already paroled him is farfetched and meritless. ..."(Ibid, p.6); Appendix "A", p. 19)

The District Judge wrote:

> "...Where, as here, the Petitioner has not received any liberties because of the parole and the possibility of future liberty is purely speculative, this Court is not of the opinion that a liberty interest is at stake. ..." (Vol. I, D.23, p.2; Appendix "A", p. 6)

From the District Court's order denying the writ, appeal was prosecuted to the United States Court of Appeals for the Eleventh Circuit. On August 19, 1987, a divided panel of the Court of Appeals reversed the District Court's order. Ellard v. Board, 824 F.2d 937 (11th Cir. 1987); Appendix "B".

Where the District Court had found that Respondent Ellard had no constitutionally protected liberty

interest, since the parole never effected his release to the free world, two judges of the Court of Appeals found a liberty interest on the basis that: (1) liberty interest is a matter of form, so that anything called "parole" creates a liberty interest. "...[words and form] are the essence of a substantive liberty interest created by state law. ..." (824 F.2d 937, 943; Appendix "B", page 38) (2) Although Ellard was never released to the free world, he was released from the physical custody of Alabama's prisons (note 4, 824 F.2d 937, 943; Appendix "B", page 40) (3) The Alabama Supreme Court had ruled that Ellard had the right to a due process hearing, (See note 4, pages 14-15, above). (824 F.2d 937, 944)

Ellard's claim that, if the parole had remained in effect, he would have been released, if Georgia had ever paroled him, had been rejected by the

State Courts on the grounds that Alabama law did not authorize such an abdication of responsiblity by the Alabama Parole Board. See pages 12-13, above. The District Court found as facts that this claim was "...farfetched and meritless... ." and "...purely speculative... ." See page 17, above. Yet, the Court of Appeals in a footnote adopted the legal and factual basis of Ellard's claim. (Note 6, 824 F.2d 937, 944, Appendix "B", page 42)

Finally, the heart and soul of the Court of Appeals opinion was a determination that, once a state created anything called "parole," the questions of the nature of parole, the meaning of parole statutes, the circumstances under which a parole may be revoked and the validity of state parole are all matters of Federal Constitutional Law. On the

basis of such a determination, the Court of Appeals proceeded to revise on a wholesale basis the interpretation of the Alabama statutes and on almost every point reject the State Court interpertation. For example: As noted in the preceding paragraph, where the State Courts ruled that the Parole Board was not authorized to abrogate its authority in paroling a prisoner into the custody of another state, the Court of Appeals, ignoring § 15-22-24(i); note 3, page 13), above, found that this was the necessary effect of an Alabama parole. Many of the gross deficiencies in the materials before the Board at the time of the parole, which the State Courts found to render the parole void ab initio as a matter of state law (See page 11, above), the Court of Appeals found to be mere details, the lack of which did not violate state law (824 F.2d 937, 948-949,

Appendix "B", pages 65-68) In remanding the cause to the District Court, the Court of Appeals did not limit the issues to be decided to whether Ellard had been accorded proceederal process incident to the nullification of the parole and whether there was substantial evidence in support the State Court findings, but ordered the District Court to review the reletive merits of the state determination. (824 F.2d 937, 949, Appendix "B", page 68)

Judge Fay submitted a vigorous dissent. (824 F.2d 937, 949; Appendix "B", pages 68-70)

Your Petitioners applied for rehearing, suggesting in banc consideration, but the same was denied on September 24, 1987. The mandate is now stayed November 24, 1987. (Appendix "B", pages 80-82)

STATEMENT OF THE FACTS

I.

IN RE: LIBERTY INTEREST

It is undisputed that the parole transferred Respondent Ellard from Alabama's prisons to Georgia's prisons but never effected his release to the free world nor changed the rate at which he served his concurrent life sentences. This has been found as a fact by every Court which has reviewed this case including the U. S. Court of Appeals.

II.

IN RE: THE DEFICIENCY IN THE MATERIALS BEFORE THE BOARD AT THE TIME OF THE PAROLE

The following deficiencies in the materials before the Board at the time of the Parole were found by the State Courts to be such a departure from state law as to render the parole void. The U. S.

Court of Appeals held many of them to be mere details which did not violate state law.

A. Under the Board's duty to obtain a "...complete statement of the crime. ..." and "...the circumstances or such crime. ..." (Section 15-22-25; Code of Alabama, 1975, Appendix "C"):

At the time of the parole the Board knew that Respondent Ellard had killed Charlotte Parks and attempted to kill Nancy Conn by beating them with a heavy instrument. The Board's knowledge of possible sexual impropriety by Ellard consisted in the statement "...Ellard admits having sexual intercourse with this girl [i.e. Mrs. Parks]..." (Appendix "E", page 107) and a passing reference in a copy of a report to the Georgia Parole Board, relating to Ellard's Georgia murder, that Ellard had "...abducted two

victims in Alabama and had raped each victim before murdering one and attempting to murder the other. ..." (See Ellard v. Board, 824 F.2d 937, 949 [11th Cir., 1987]; Appendix "B", page 67) However, the Board did not know:

1. That Ellard had abducted the women at about 1:00 a.m. and from then until well into the daylight hours, he repeatedly raped Mrs. Parks, forcibly sodomized both women, and forced them to perform sex acts on each other. (Appendix "E", pages 124-127)

2. That Ellard first tried to murder the the women by asphyxiating them with automobile exhaust fumes in the trunk of his car. (Ibid, page 128)

3. That Ellard had permanetly maimed Mrs. Conn by severing her fingers and blinding her in one eye. (Ibid, pages 128-129)

4. That in addition to beating her, Ellard had stabbed Mrs. Parks some fifty-eight times. (Ibid, page 130)

5. That Ellard had mutilated the body of Mrs. Parks by pulling almost all of her long blond hair out by the roots, after beating and stabbing her. (Ibid)

B. Under the Board's duty to obtain available reports of the prisoner's, "...mental and psychiatric condition and history..." (§ 15-22-25, Appendix "C"): The Board did not have any such reports before it at the time of the parole. However, the State mental hospital had examined Ellard prior to his sentence in 1971 and produced a report indicating a strong and growing desire for violent sexual activites. The report states:

> "... He (Ellard) does say that he feels he has to perform more daring acts in order to get this feeling (the feeling in his stomack and chest) and that

he is afraid of what he might do if he had another chance'. ..." (Appendix E, page 132)

This report was avilable at the time of the parole. (Ibid, page 131)

c. Under the Board's duty to obtain a "...complete criminal record of such prisoner. ..." (§ 15-22-25, Appendix "C"):

The Board knew that Ellard had murdered and raped Mrs. Parks and attempted to murder Mrs. Conn, that he had abducted a female university student in Birmingham, had taken her to Georgia and murdered her in 1971, and that he had escaped from prison in 1977. However, the Board did not know:

1. That while awaiting trial in 1971, Ellard had offered a fellow prisoner $500.00 to kill Mrs. Conn, the surviving prosecuting witness. (Appendix "E", page 142)

2. That while awaiting trial in 1971, Ellard had escaped from the county jail. (Ibid, page 143)

3. While on escape in 1977, Ellard procured a pistol, attempted to highjack a truck, stole a car, and attempted to cash a stolen government check. (Ibid, pages 133-135)

SUMMARY OF THE ARGUMENT

1. A common practice among the states is to use parole to transfer prisoners, who are under sentence in other jurisdictions, to such other jurisdictions. There are many advantages to this arrangement for prisons, parole boards and prisoners. However, if such prisoners obtain a liberty interest in such paroles, the paroles could not be reviewed without meeting due process requirements, which would mean transfer-

ring prisoners from state to state. Therefore, the question of liberty interest in an interstate prison transfer by parole is of great importance. Although this Honorable Court has never had occasion to address this issue, this Courts' decisions clearly demonstrate that liberty interest is a not matter of form as held by the Court of Appeals, but a matter of substance. Compare Morrissey v. Brewer, (408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 [1972]) with Jago v. Van Curen, (454 U.S. 14, 70 L.Ed.2d 13, 102 S.Ct. 31 [1981]). The definition of liberty interest as set out in Morrisey v. Brewer (408 U.S. 471, 477 and 481-482, 33 L.Ed. 484, 492 and 494-495), includes no factors relevent to interstate prison transfers. This Honorable Court has consistently refused to find anything of constitutional significance in inter-

state prison transfers. E.g., Olim v. Wakinekona, 461 U.S. 238, 75 L.Ed.2d 813, 103 S.Ct. 1741 (1983) There is simply no liberty interest created by a parole which does not effect a prisoner's release to the free world. Jago v. Van Curen, above.

Given the importance of this issue and the inconsistency between the decision of the Court of Appeals and those of this Honorable Court, the writ should issue.

2. The power of the states to interpret their own laws has been a keystone to federalism for two hundred years. Concern for federalism, as well as concern for avoiding divergent interpretations of laws, has led to a universal policy of respecting the interpertation placed on a jurisdiction's laws by the courts of that jurisdiction.

Parole is a creature of state law. While recognizing this, the Court of Appeals ruled that once a state created any right called "parole," it had exhausted its descretion in the matter. The nature of parole, the validity of a given parole and whether it vested in a person are all matters of Federal Constitutional law, according to the Court of Appeals. In so ruling, the Court of Appeals ruled contrary to the controlling authorities of this Honorable Court on the effect of state law on the nature of parole. E.g., Greenholtz v. Inmates, 442 U.S. 1, 60 L.Ed.2d 668, 99 St.Ct. 2100 (1979); Connecticut v. Dumschat, 452 U.S. 458, 69 L.Ed.2d 158, 101 S.Ct. 2460 (1981) In rejecting the State Court interpretations of Alabama's parole statutes, the Court of Appeals ruled contrary to a two-hundred year old

policy of this Honorable Court, holding that State Court interpretations of state statutes are binding on the Federal Courts. E.G., Posadas de P.R. Asso. V. Tourism Co. P.R. 478 U.S. ____, 92 L.Ed.2d 266, 279, 106 S.Ct. 2968, 2975-2976 (1986) The writ should issue to review the Court's action.

ARGUMENT

I.

DOES A PAROLE WHICH MERELY TRANSFERS A CONVICT-PRISONER FROM ONE STATE'S PRISONS TO ANOTHER STATE'S PRISONS CREATE A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST?

A NOVEL QUESTION DECIDED INCONSISTENTLY WITH PRIOR DECISIONS OF THIS HONORABLE COURT.

This is an extremely important question for the federal and state parole

and prison authorities, for prisoners under sentences in different jurisdictions and for the public, which is extremely concerned about crimes committed by paroled prisoners.[5] It is not at all unusual for a convict to be under charges or sentences from several different jurisdictions. There are various ways that such convicts can be made available to another jurisdiction for trial or service of sentence, but there are several advantages, to both governments

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[5]One indication of public concern over parole is the growing number of law suits brought by victims of parolees against parole authorities. See, for example, Martinez v. California, 444 U.S. 277, 62 L.Ed.2d 481, 100 S.Ct. 553 (1980); Payton v. United States, 679 F.2d 475 (5th Cir, Unit "B", 1982); Sellers v. Thompson, 452 So.2d 460 (Ala, 1984); and Taitt v. United States, 770 F.2d 890 (10th Cir, 1985).

and prisoners, in doing this by parole. These advantes grow out of the fact that a parolee, whether released to the free world or transferred to another prison, continues to serve his sentence. Thus, where a state paroles a prisoner to another state's detainer, the prisoner continues to serve the first state's sentence, while burdening neither the prison facilities nor the parole apparatus of that state. From the prisoner's point of view, such an arrangement can be advantagous in various ways.[6] If such interstate prisoner

[6]It is difficult to identify what advantages accrued to Respondent Ellard as a result of the parole. His Georgia life sentence is concurrent with his Alabama life sentence. His rate of service before the parole, during the parole and after its nullification was the same. The parole only affected the place of service, which remains the same after the nullification of the parole.

transfers by parole create liberty interests in the prisoners, then, if the need arises to review a parole, the parolee would have to be accorded procedural due process. Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972). This would mean transporting the prisoner from one state to another, perhaps a considerable distance. Laying aside the cost of such transportation, there would be considerable risk of escape by the convict. These concerns would make the the states hesitant to use parole for interstate prison transfers.

While this question is novel, in that this Honorable Court has never had occasion to address the liberty interest issue in the context of an interstate prison transfer by parole, this Honorable

Court's decisions clearly show that such paroles create no liberty interest. This was the conclusion reached by the State Courts and the District Court. Finding no liberty interest, the District Court declined to review the procedures by which Respondent Ellard's parole was nullified.

The Court of Appeals held that liberty interest is a matter of form. The Court expressly so held at 829 F.2d 937, 942-943 (Appendix "B", pages 37-38), and throughout the opinion the language shows an understanding that "parole" means "liberty interest." Yet, this Honorable Court's cases on liberty interest have involved a variety of processes, including commutation,[7] good

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[7]Connecticut v. Dumschat, 452 U.S. 458, 69 L.Ed.2d 158, 101 S.Ct. 2460 (1981).

time,[8] parole[9] and probation.[10] In none of these cases did this Court pay the slightest attention to the name given to the process. The liberty interest issue rose or fell, not on words or form but on substance, i.e., what was intended to be accomplished and what was accomplished. This point is best illustrated by comparing Morrissey v. Brewer, (408 U.S.

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[8]Wolff v. McDonnell, 418 U.S. 539, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974).

[9]Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972); Greenholtz v. Nebraska, 442 U.S. 1, 60 L.Ed.2d 668, 99 S.Ct. 2100 (1979); Jago v. Van Curen, 454 U.S. 14, 70 L.Ed.2d 13, 102 S.Ct. 31 (1981); Board of Paroles v. Allen, 482 U.S.___, 96 L.Ed.2d 303, 107 S.Ct. 2415 (1987).

[10]Gagon v. Scarpelli, 411 U.S. 778, 36 L.Ed.2d 656, 93 S.Ct. 1756 (1973); Douglas v. Buder, 412 U.S. 430, 37 L.Ed.2d 52, 93 S.Ct. 2199 (1973); Bearden v. Georgia, 461 U.S. 660, 76 L.Ed.2d 221, 103 S.Ct. 2064 (1983).

471, 33 L.Ed.2d 484, 92 S.Ct. 2593 [1972]) with Jago v. Van Curen, (454 U.S. 14, 70 L.Ed.2d 13, 102 S.Ct. 31 [1981]). Morrissey and Van Curen received processes with the same name: "parole". The purpose of the paroles was the same: To conditionally release the respective parolees to the free world. If liberty interest arises out of form, either both Morrissey and Van Curen had liberty interests or neither had a liberty interest. Yet, this Court found a liberty interest in Morrissey but none in Van Curen. Why? Morrissey's parole was put into effect, and he was actually released to the free world, but Van Curen's parole was rescinded before he was actually released. In Jago v. Van Curen, above, this Honorable Court held that until and unless the parolee is

actually conditionally released to the free world, there is no liberty interest. Liberty interest is a matter of substance, not form.

The Court of Appeals also found that the instant parole created a liberty interest, because the Alabama Supreme Court held that Ellard had the right to due process incident to the nullifcation. See note 4, page 14-15, above. This analysis is the exact reverse of the analysis followed by this Honorable Court in case after case. This Court has always found due process rights flowing from liberty interest, not vice versa.

The Court of Appeals refused to follow this Honorable Court's teaching in Jago v. Van Curen, above, because under the parole, Ellard was released from the physical custody of Alabama's prisons

in order to enter Georgia's prisons. See note 4, 824 F.2d 937, 943; Appendix "B", page 40. The question is then, whether a liberty interest comes into being when a paroled prisoner is released from prison or when such a prisoner enters the free world. In a parole to the free world, this issue would normally be moot, since the two events occur simultaneously, but this is not the case with a parole to a detainer.

What is the nature of liberty interest, in the case of parole? In Morrissey v. Brewer, above, this Honorable Court discussed this point at some length. Morrissey involved a parole to the free world. In discussing the purpose of such a parole, this Court wrote:

> "...[Parole's] purpose is to help individuals reintegrate

> into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed...." (408 U.S. 471, 477, 33 L.Ed.2d 484, 492).

The obvious purpose of a parole to a detainer is to transfer a prisoner to another prison. On the nature of a parole to the free world this Court wrote,

> "...The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence...." (Ibid.)

Notice, it is the release from prison, generally, not the release from a particular prison. On the nature of the constitutionally protected interest created by a parole to the free world (i.e., liberty interest), this Court wrote:

> "...We turn to an examination of the nature of the interest of the parolee in his continued

liberty. The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison... He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation... The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked...." (408 U.S. 471, 481-482, 33 L.Ed.2d 484, 494-495); emphasis supplied)

Obviously, not one consideration mentioned by this Honorable Court has the slightest relevance to a prisoner who is paroled from one state's prisons to another state's prisons. If liberty interest is a matter of substance, then its substance is release into society, not release from one prison to another.

The substance of a parole from one state's prisons to another is an interstate prison transfer. This Honorable Court has consistently rejected suggestions of constitutional rights in prisoners arising out of inter-state prison transfers. E.g., Olim v. Wakinekona, 461 U.S. 238, 75 L.Ed.2d 813, 103 S.Ct. 1741 (1983); Ponzi v. Fesseadea, 258 U.S. 254, 66 L.Ed. 607, 42 S.Ct. 309, 22 A.L.R. 879 (1922). If liberty interest is a matter of substance, then no such interest arises

from a parole which simply transfers a prisoner from one state's prisons to those of another state.

The case which comes closest on the level of substance to the instant case is the one which the State Courts and the District Court followed but which the Court of Appeals refused to follow: Jaqo v. Van Curen, above. The parole in Jaqo was to the free world, like that in Morrissey, rather than to another state's prisons, but this Honorable Court rejected the parolee's claim to a hearing incident to a nullifcation of his parole. The reason for the rejection was that the parolee was never actually released to the free world. Like the parolee in Jaqo, Respondent Ellard never reached the free world under the instant parole and

therefore, he never obtained a liberty interest.

Given the wide spread use of parole for interstate prison transfers, the question of whether such paroles create liberty interest will have to be addressed at some point. The Eleventh Circuit has addressed it in this case and decided it in a manner which is in irreconcilable conflict with this Honorable Court's decisions and opinions on both liberty interest and interstate prison transfers. The issue is clearly presented in this case on the basis of undisputed facts. It is respectfully submitted that in the interests of constitutional uniformity and certainty, the writ should issue in this case to review this novel question.

II.
THE VALIDITY OF A STATE PAROLE IS A STATE LAW QUESTION.

THE DECISION AND OPINION OF THE ELEVENTH CIRCUIT CONFLICTS WITH THE CONTROLING DECISIONS OF THIS HONORABLE COURT.

The basic issue here is: To what extent do state parole statutes, as authoritatively construed by state courts, control the nature of parole rights and the validity of the granting of such rights? The importance of this issue is obvious. Federalism has been the keystone to American Constitutional Law for two hundred years. If the States have no say over the meaning of their laws, there is little or nothing of federalism left. Beyond the concerns for constitutional form, there is the obvious problem of divergent interpretations of state statutes. The Eleventh Circuit ruled that "...the construction of a

state's laws by its own Courts may be of benefit...." (824 F.2d 937, 944; Appendix "B", page 43), but state agencies and officials need more than help in understanding the laws under which they operate and which they enforce--they need to know precisely what are their authority, duties, and responsibilities. This need is just as great in the case of citizens. Unless state court interpretations of state laws are authoritative, they are little more than traps for those who rely on them. In recognition of these concerns this Honorable Court, the highest judicial authority in the nation, has consistently held itself bound by state court interpretations of state law; the federal circuits and other courts have, in applying the laws of other jurisdictions, looked to the judicial determinations of those jurisdictions for the proper

interpretation,and Congress has limited federal habeas corpus actions by state prisoners, such as the instant proceeding, to applications: "...on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States...." 28 U.S.C. Section 2254(a).[11]

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[11]This statute has been universally held to bar federal review of state court interpretations and applications of state law. E.g., Engle v. Isaac, 456 U.S. 107, 119, 71 L.Ed.2d 783, 795, 102 S.Ct. 1558 (1982); Mendiola v. Estelle, 635 F.2d 487, 489 (5th Cir, 1981); Grace v. Butterworth, 635 F.2d 1, 4 (1st Cir, 1980); Coombs v. Tennessee, 530 F.2d 695, 698 (6th Cir. 1976); cert. den., 425 U.S. 954, 48 L.Ed.2d 198, 96 S.Ct. 1731. Bond v. Oklahoma, 546 F.2d 1369, 1377 (10th Cir, 1976). However, in the Eleventh Circuit's view, the meaning and application of state parole statutes is a federal question. See also Coleman v. Alabama, 827 F.2d. 1469 (11th Cir, 1987), holding that federal habeas corpus lies to vindicate a convict's alleged rights under a state youthful offender statute.

The law is clear and it was recognized by the Court of Appeals (Ellard v. Board, 824 F.2d 937, 941 [11th Cir, 1987] Appendix "B", page 31), that the Constitution does not create a right to parole. Connecticut v. Dumschat, 452 U.S. 458, 463-464, 69 L.Ed.2d 158, 164, 101 S.Ct. 2460 (1980); Greenholtz v. Inmates, 442 U.S. 1, 7, 60 L.Ed.2d 668, 675, 99 S.Ct. 2100 (1979). Parole is a creature of state law. Once a liberty interest has been created by state law and become vested in a person, the prohibitions of the Fourteenth Amendment come into play. Once a state creates a liberty interest, it may not practice invidious discrimination in granting or withholding the right. Once such a right vests in a person, he may not be deprived of the right without due process of law. This much is hornbook law.

However, which law, state or federal, controls the issues of whether the state law has created a right, the nature of the right created, the authority to grant the right to a person and whether or not the right has vested in a person? In most of the parole and liberty interest cases which have come before this Honorable Court, these issues were undisputed, but in the instant case these very issues have been the "bone of contention" through more than four years of litigation.

Eleventh Circuit ruled that once a state creates a right called "parole," the state's discretion in the matter is exhausted. The nature of the parole, the authority to issue a parole and the validity of a parole, all became matters of Federal Constitutional law. For example, the Alabama Legislature

created a special sort of parole, which allows Alabama prisoners, who are under sentence in other jurisdictions, to be paroled to such other jurisdictions, on condition that they be returned to Alabama, if they are released before the expiration of their Alabama sentences. Section 15-22-24(i); Appendix "C". However, the Eleventh Circuit rejected this (note 2, 824 F.2d 937, 945, Appendix "B", page 36) and ruled that, as a matter of federal law, the issuance of any parole amounts to a '...decision that the State's penological interests do not require [continued] imprisonment.' See Bearden v. Georgia,[12] 461 U.S. 669-70,

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[12] Bearden v. Georgia, (461 U.S. 660, 76 L.Ed.2d 221, 103 S.Ct. 2064 [1983]), involved probation (an alternative to imprisonment) not parole (a way of serving a prison sentence). Its relevance on this point to a parole to another state's prison is hard to see.

103 S.Ct. at 2071...." (824 F.2d 937, 946 Appendix "B", page 53). Although the Eleventh Circuit agreed with the state courts that a void Alabama parole could be nullified,[13] the Court of Appeals found that, if the parole was valid, it could not be set aside for any reason, except a violation of a condition.[14] (824 F.2d 937, 945; Ibid, page 50). The Alabama statutes (Appendix "C") on their face place severe restraints on the granting of parole, and the state courts

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[13]This was one of the few points on which the Eleventh Circuit agreed with the State Courts.

[14]Strangely, immediately after the language quoted by the Eleventh Circuit from Bearden, as set out in the previous sentence we find: "...A probationer's failure to make reasonable efforts to repay his debt to society may indicate that this original determination [that the State's penological interest do not require imprisonment] needs reevaluation, and imprisonment may now be required to satisfy the State's interests...." (461 U.S. 660, 670, 76 L.Ed.2d 221, 231).

held that these provisions compelled the Board to review paroles, when it appeared that the parole statutes had been violated.[15] The Eleventh Circuit decided that what the state statutes really do is place severe restrains on nullifying void paroles. (824 F.2d 937, 942-943, Appendix "B", pages 41-42, citing the dissenting opinion in the Alabama Supreme Court as authority.) Finally, many of the gross deficiencies in information outlined in the Statement of the Facts, above, which the State Courts found violated the state statutory mandates, the Eleventh Circuit dismissed as mere

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15"...In fact, under such circumstances it would be the duty of the Board to do so. Mandamus would lie to compel it to act... A failure to act could subject the Board members to criminal sanctions...." (Ellard v. State, (474 So.2d 743, 752)

details. (824 F.2d 937, 948). Thus, the Eleventh Circuit Court of Appeals swept away one of the last vestiges of federalism--a state's sovereignty over the meaning of its own laws. In so ruling, the Court of Appeals, ruled contrary to inumerable prior decisions of this Honorable Court.

This Honorable Court has always looked to state law for authority on the nature of parole rights. Greenholtz v. Inmates, above; Connecticut v. Dumschat, above; Board v. Allen, 482 U.S.___, 96 L.Ed.2d 303, 107 S.Ct. 2415 (1987). These cases arose out of civil rights actions under 42 U.S.C. Section 1983, and there were no state cases construing the

state statutes.[16] However, in each of these cases this Court looked to the state statute, not the Federal Constitution, for the nature of the interest created.

In following state law on the nature of parole rights, this Honorable Court simply followed a broader policy, which it has consistently followed for two hundred years: That state court interpretations of state laws are binding on the federal courts. Rather than burden the record with a multitude of authorities on this well recognized point, we call the Court's attention to the following samples from the last

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16"...since respondents elected to litigate their due process claim in federal court, we are denied the benefit of the Nebraska courts' interpretation ...." (Greenholtz 442 U.S. 1, 12, 60 L.Ed.2d 668, 678).

twenty years: Posadas de P.R. Asso. v. Tourism Co. of P.R., 478 U.S.___, 92 L.Ed.2d 266, 279, 106 S.Ct. 2968, 2975-2976 (1986); New York v. Ferber, note 24, 458 U.S. 747, 769, 73 L.Ed.2d 1113, 1131-1132, 102 S.Ct. 3348 (1982); Illinois v. Vitale, 447 U.S. 410, 416 and 422, 65 L.Ed.2d 228, 236 and 239, 100 S.Ct. 2260 (1980); Adderly v. Florida, 385 U.S. 39, 46, 17 L.Ed.2d 149, 155, 87 S.Ct. 242 (1966). If this Honorable Court has no authority to revise state court interpretations of state law, as this Court has always held, how could the United States Court of Appeals have such authority?

Parole as noted above, is a matter of state law; but for state law, there would be no parole at all. The Court of Appeals' ruling that once a state has decided to create a right called

"parole", it has exhausted its discretion in the matter, is a radical and novel departure from prior authorities. In revising the state court interpretations of Alabama's parole statutes, the Eleventh Circuit ruled contrary to two hundred years of precedent and appointed itself the supreme parole authority for the states of the Circuit. As a result of the Eleventh Circuit's action, the citizens and state agencies and officials of the Southeastern United States have no idea what reliance, if any, to place on state court interpretations of state laws. If the Court of Appeals erred in this action, as we submit that it did, the writ should issue to correct the Court of Appeals' actions. If, on the other hand, the Court of Appeals decision is correct, then the writ should issue to clarify the matter and establish a new

national policy. If the Bicentennial of the United States Constitution is to be marked by abolishing the last remnants of federalism, it ought to be done on a nationwide scale and not limited to a few poor southern states in the Eleventh Circuit.

CONCLUSION

In conclusion, the Petitioners respectfully submit that the decision and opinion of the United States Court of Appeals for the Eleventh Circuit, in finding a liberty interest in the Respondent, decided a novel question in a manner inconsistent with the controlling decisions of this Honorable Court and, in revising the state court interpretation of Alabama's parole statutes, ruled in direct conflict with two hundred years of precedent of this Honorable Court.

Therefore, the Petitioners pray that the writ issue to review the decision and opinion of the Honorable Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph F. L. Marston, III, an Assistant Attorney General of Alabama, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and, as one of the Attorneys for the Petitioners, I hereby certify on this _____day of November, 1987, I did serve the requisite number of copies of the foregoing on the Attorney for Richard Mark Ellard, Respondent, by mailing the same to said Attorney, first-class postage prepaid and addressed as follows:

Honorable Ralph I. Knowles, Jr.
Attorney at Law
P.O. Box 86
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87-849

Supreme Court, U.S.
FILED
NOV 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO._____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

ALABAMA BOARD OF PARDONS AND
PAROLES, EALON M. LAMBERT, JOHN
THOMAS PORTER, and RAY MORROW,
Members of the Board of Pardons
and Paroles of the State of
Alabama, and the
STATE OF ALABAMA,

PETITIONERS,

vs.

RICHARD MARK ELLARD,

RESPONDENT,

APPENDICES TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OF

DON SIEGELMAN
ATTORNEY GENERAL

AND

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OCTOBER TERM, 1987

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PETITIONERS,

vs.

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OF

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APPENDIX A

ORDERS AND OPINIONS OF
THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE
DISTRICT OF ALABAMA

Filed May 29, 1986
Clerk
U.S. DISTRICT COURT
MIDDLE DISTRICT OF ALA.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

RICHARD MARK ELLARD,	)
	)
Petitioner,	)
	) CIVIL ACTION NO.
VS.	) 85V-1264-N
	)
ALABAMA BOARD OF PARDONS AND PAROLES; ET AL,	)
	)
Respondents.	)

O R D E R

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that the

Petition for Writ of Habeas Corpus filed herein by Petitioner Ellard be, and the same is hereby, dismissed with prejudice with costs taxed against the Petitioner, for which execution may issue.

DONE this 29th day of May, 1986.

/S/R. E. VARNER
UNITED STATES DISTRICT JUDGE

FILED
May 29, 1986
Clerk
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

RICHARD MARK ELLARD,	
Petitioner,	
VS.	CIVIL ACTION NO. 85V-1264-N
ALABAMA BOARD OF PARDONS AND PAROLES; ET AL,	
Respondents.	

OPINION

This cause is submitted on (1) the Petition for Writ of Habeas Corpus seeking relief for the Petitioner, Richard Mark Ellard, from a detainer filed by the Alabama Department of Corrections with the Georgia Board of

Corrections where he is confined[1]; (2) the Recommendation and Corrected Recommendation of the Magistrate thereon; (3) the Petitioner's objections to the Magistrate's recommendations; and (4) the Respondents' response to Petitioner's objections. Based thereon, this Court is of the opinion that the petition should be denied.

The Court of Criminal Appeals of Alabama in Ellard v. State, 474 So.2d 743 (Ala.Ct.of Cr.App. 1984), and the Supreme Court of Alabama in Ex parte Ellard, 474 So.2d (S.Ct. Al. 1985), considered the facts and law pertinent to the Ellard case and, for various reasons, concluded that Ellard's parole should have been set aside by the Parole Board. Considerable disagreement was voiced as to whether the

1/ The Magistrate's recommendation mentions several problems which Petitioner faces in this proceeding.

parole itself was void ab initio (because of violation by the Parole Board of its duties) or whether, while the parole itself was valid initially, it could be revoked because of error therein by the Parole Board. Dissenting Justices took the position that, under the law of Alabama, the parole could legally not have been revoked and that its revocation was, therefore, without authority. In short, the disagreements between the dissenting and the majority opinions of the Supreme Court of Alabama primarily concerned the construction of the State law of Alabama, a matter over which this Court has no authority except for constitutional reasons. The dissenters, however, relying upon Morrissey v. Brewer, 408 U.S. 471 (1972) and Bearden v. Georgia, 461 U.S. 660, took the position that revocation of a parole for reasons other than a violation of parole

would be an act so arbitrary and capricious as to violate the due process clause of the United States Constitution. Those cases, however, involved terminations of freedoms being enjoyed by the subjects. Where, as here, the Petitioner has not received any liberties because of the parole and the possibility of future liberty is purely speculative, this Court is not of the opinion that a liberty interest is at stake. These matters have been fully discussed by the Magistrate and this Court adopts the view of the Magistrate thereon. The majority of the Supreme Court of Alabama and the full panel of the Court of Criminal Appeals of the State of Alabama have, at least implicitly, adopted that view.

Accordingly, this Court is of the opinion that the Petition of Writ of Habeas Corpus filed by Petitioner Ellard

should be denied.

An Order will be entered in accordance with this Opinion.

DONE this 29th day of May, 1986.

/S/R. E. VARNER
UNITED STATES DISTRICT JUDGE

FILED
May 6, 1986
Clerk
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

RICHARD MARK ELLARD,	
Petitioner,	
VS.	CIVIL ACTION NO. 85V-1264-N
ALABAMA BOARD OF PARDONS AND PAROLES; ET AL,	
Respondents.	

CORRECTED RECOMMENDATION OF THE MAGISTRATE

The Recommendation of the Magistrate filed May 2, 1986, is hereby corrected in the following respects:

At the end of the first paragraph, "resume" appears; the Magistrate strikes the word "resume" and adds the word "name."

In that section of the Recommendation entitled "Due Process Claim" where the words "subject to all of the necessary restraints that inhere in a prisoner," the Magistrate strikes the work "prisoner" and substitutes the word "prison." In all other respects, the Recommendation is affirmed.

Done this 6th day of May, 1986.

/S/M. LEWIS GWALTNEY
UNITED STATES MAGISTRATE

FILED
May 2, 1986
Clerk
U.S. DISTRICT COURT
MIDDLE DIST. OF ALA.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

RICHARD MARK ELLARD,	
Petitioner,	
VS.	CIVIL ACTION NO.
	85V-1264-N
ALABAMA BOARD OF PARDONS AND PAROLES; ET AL,	
Respondents.	

RECOMMENDATION OF THE MAGISTRATE

This court is presented in a petition for the writ of habeas corpus filed by Richard Mark Ellard, a prisoner. He sues as respondents the Alabama Board of Pardons and Paroles (hereafter, the Board), its individual members, and the

State of Alabama. It is established law that in a petition for the writ of habeas corpus brought pursuant to 28 U.S.C. 2254 by a state prisoner, the proper and only respondent is his immediate custodian. West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973); Wales v. Whitney, 114 U.S. 564 (1885); and Mackey v. Gonzalez, 662 F.2d 712 (5th Cir. 1981). But, insomuch as the Magistrate concludes that there is no merit to this petition, there is no need to require an amendment to the petition. The Attorney General for the State of Alabama has made an appearance in this case and has ably represented the state's position and any state official Ellard might resume.

In 1972, Ellard entered a plea of guilty in the Circuit Court of Blount County, Alabama, to a charge of murder in the first degree and assault to murder,

for which he received a life sentence and twenty-years imprisonment, respectively, to the charges. The vile, contemptible sexual conduct Ellard forced upon his victims before he killed one and attempted to kill another is well documented in the file here, but no useful purpose would be served by reciting them in this recommendation.

It further appears from the file that subsequent to the disposition of charges against him in Alabama, Ellard was carried to the State of Georgia where he entered a plea of guilty to a charge of murder. His victim there appears to have been a female carried from Alabama to Georgia by Ellard and the circumstances involving that victim appear to have been similar to the Alabama victims. The State of Georgia imposed a life sentence to run concurrert

with the Alabama life sentence.

A recitation of dates as found from this file are important only insofar as to establish a framework within which the Board dealt with Ellard. The Board's actions triggered this lawsuit. Taken from the file, it appears:

On March 2, 1981, the Board granted Ellard a parole and turned him over to the State of Georgia who had placed detainer with the Alabama authorities.

In granting Ellard a parole, the Board issued to him its certificate of parole.

Subsequent to the granting of the parole, public opinion appears to have been brought against the Board for their actions to the extent that on April 16, 1981, the Board requested the Attorney General for Alabama to render an official opinion as to whether or not the Board

had the authority to rescind, revoke, nullify, and void a grant of parole which had been legally issued and executed in Ellard's action.

On April 17, 1981, the Attorney General issued an opinion advising the Board that it had the authority.

On April 17, 1981, the Board declared Ellard delinquent as a technical violator under a provision of his parole conditions.

After Ellard had been placed in the jurisdiction of the State of Georgia, the Governor of Alabama entered into an agreement with the Governor of Georgia whereby Ellard was returned to Alabama to face revocation of parole by the Alabama Board. On July 15, 1982, the Board ordered the revocation of the certificate of parole after conducting a hearing. Ellard was then returned to the Georgia

officials requesting that Ellard be returned to the Alabama prison system if he should be released in Georgia.

Ellard commenced state court action against the Board. He stated in the Circuit Court of Montgomery County, Alabama, which court held that pursuant to Alabama law the parole which had been granted Ellard was void ab initio. In a long, exhaustive opinion, the Alabama Court of Criminal Appeals held that the Board had acted not in accordance with the authority granted to the Board by Alabama law. That court affirmed the judgment of the Circuit Court. Appeal was taken to the Alabama Supreme Court where in a five to four decision the Alabama Supreme Court held that the Board had the authority to revoke Ellard's parole because the Board had made an error in considering Ellard's eligibility

for parole. Accordingly, Ellard has exhausted his state remedies.

In his petition for habeas corpus presented to this court, Ellard raises two federal questions. First, he claims that the Alabama procedure afforded him denied him due process and, secondly, that the procedures had denied him equal protection of the law.

At the outset, the Magistrate finds that the evidence unquestionably demonstrates that during the period of time involved Richard Mark Ellard has never been free of prison environments, wither in Alabama or in Georgia. When Alabama granted its parole, Ellard did not enter the free world weighted only with parole conditions. When he went to Georgia, he went into the Georgia prison system and again was not priviledged with free-world freedom which is one of the purposes of parole.

A reading of Ellard's petition for the writ of habeas corpus presented to this court, Ellard's theme appears to be that since Alabama has paroled him and if Georgia paroles him, which may be a possibility, he would then enter the free world weighted with only conditions of parole imposed by two sovereigns, Alabama and Georgia, because Alabama had already granted him a parole. By revoking his parole, Alabama has now denied him that expectation.

The parties have freighted this file extensively with pleadings, briefs, and documents. The petitioner appears to argue that Alabama had no right to revoke his parole because among other things he had never violated any of the conditions of parole imposed upon him by Alabama and, further, that the proceedings of the Alabama Parole Board were unconstitutional because Alabama law does not

provide the Board with subpoena powers so that witnesses could be subpoenaed to appear before the Board.

The State of Alabama comes closer to arguing what the Magistrate considers to be the simple issue in this case and that is whether or not under federal law, Richard Mark Ellard was entitled to the protection of due process when the Board revoked a parole whcih, in the opinion of the Magistrate, had ill-advisedly been granted to Ellard. It is the opinion of the Magistrate and his conclusion that the circumstances of this case show Ellard was not entitled to any federal due process protection.

Due Process Claim

Petitioner relies on Morrissey v. Brewer, 408 U.S. 471 (1972), as the basis for his due process claim. Such reliance is misplaced. Morrissey is sharply distinguishably from the instant case. The factual settings are entirely different.

Morrissey clearly holds that a measure of due process must be afforded a parolee who is charged with parole violation because the parolee was engaging in conditional liberty. He could be gainfully employed, free to be with family and friends, and to form the enduring attachments of normal living. Ellard, on the other hand, has always been confined either in Alabama or Georgia prison systems and is, thus, subject to all of the necessary restraints that inhere in a prisoner.

See Greenholz, itc. v. Inmates, etc., 442 U.S. 1 (1979); Gagnon v. Scarpelli, 411 U.S. 78 (1973) (probation revocation).

Ellard's contention of possible freedom in the future, if Georgia paroles him, since Alabama has already paroled him, is farfetched and meritless.

In Thomas v. Sellers, 691 F.2d 487 (11th Cir. 1982), the appellate court examined Alabama's parole system and ruled that it does not contain any language that mandates parole as was found in Greenholz. Further, that when the statute is framed in discretionary terms, there is not a liberty interest created.

The Magistrate finds that there is no merit to Ellard's due process claim.

Equal Protection of Laws

Although Ellard claims that he was denied equal protection of the laws, the Magistrate finds there is no merit to this claim. Concluding as I have that he was not entitled to any due process in the revocation of his parole, I find that the Board has not violated any equal protection right. Thomas v. Sellers, supra, provides that Alabama's parole statute is framed in discretionary terms and there is no liberty interest created. Absent any flagrant or unauthorized action by the parole board, the discretionary power vested in the board will not be interferred with by the federal courts. I find no flagrant or unauthorized action by the Alabama Pardons and Paroles Board in this case. Accordingly it is,

RECOMMENDED that the petition for

the writ of habeas corpus be denied and that this case be dismissed.

Done this 2nd day of May, 1986.

/S/M. LEWIS GWALTNEY
UNITED STATES MAGISTRATE

CIVIL ACTION NO. 85-H-1264-N

O R D E R

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of thirteen (13) days from the date of mailing to them. Any objections filed must specifically identify the findings in the Magistrate's Recommendation objected to. Frivolous, conclusive, or

general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate's report shall bar the party from a de novo determination by the District Court of issues covered in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. Nettles v. Wainwright, 677 F.2d 404 (Fifth Cir. 1982). See Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981, en banc), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Having reviewed the tapes and original records, I conclude that they are adequate for purposes of review.

Parties planning to object to this report and recommendation but unable to pay the fee for a transcript of the record are advised that a judicial determination that transcription is necessary is a prerequisite to payment of the fees by the United States.

Done this 2nd day of May, 1986.

/S/M. LEWIS GWALTNEY
UNITED STATES MAGISTRATE

APPENDIX B

OPINION OF THE COURT OF APPEALS

824 F.2D 937-948

RICHARD MARK ELLARD,
Petitioner, Appellant,

v.

ALABAMA BOARD OF PARDONS AND PAROLES; Ealon M. Lambert, John Thomas Porter, and Ray Morrow, members of the Board of Pardons and Paroles of the State of Alabama; and State of Alabama,
Respondents - Appellees.

No. 86-7438.

United States Court of Appeals,
Eleventh Circuit.

August 19, 1987.

Appeal from the United States District Court for the Middle District of Alabama.

Before FAY and KRAVITCH, Circuit judges, and MORGAN, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

At issue in this appeal is whether a prisoner who has been paroled by one state directly into the custody of

another state has a constitutionally protected liberty interest in the first state's grant of parole. The district court concluded that, because such a prisoner has not been released into society, the grant of parole does not create a liberty interest protected by the Due Process Clause of the fourteenth amendment. We reverse and remand to the district court for an evidentiary hearing.

1. BACKGROUND

In 1972, appellant, Richard Mark Ellard, pleaded guilty in Alabama to one count of first degree murder and one count of assault with intent to murder. He was sentenced to life in prison on the murder charge and to a concurrent 22-year

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1. The details of Ellard's crimes are set forth in Ellard v. State, 474 So.2d 743, 746 (Ala. Crim. App. 1984), aff'd on other grounds sub. nom. Ex Parte Ellard, 474 So.2d 758 (Ala. 1985).

sentence on the assault charge. In 1976, Ellard pleaded guilty in Georgia to another murder charge.[1] He was given a life sentence to run concurrently with the Alabama sentences. After the Georgia sentence was imposed, Ellard remained in custody in the Alabama prison system.

In 1981, the Alabama Board of Pardons and Parole granted Ellard parole and released him into the custody of the state of Georgia to serve his life sentence there. Following a burst of public outrage at the parole decision, the Parole Board requested Alabama Attorney General Charles Graddick to provide an opinion on whether the Board validly could revoke a parole that was "legally issued" but that operated only to release the parolee directly into the custody of another state to serve a pending sentence there. Graddick

informed the Board that in his opinion the decision to grant Ellard parole was based upon incomplete information and thus was in violation of Alabama law. He concluded that the Board therefore was authorized to reconsider its decision to grant Ellard parole. The Board, relying on this opinion, declared Ellard in technical violation of his parole and had him returned from Georgia. After conducting an evidentiary hearing, the Board revoked Ellard's parole. Ellard subsequently was transferred back to Georgia to serve out his sentences there.

Ellard commenced state proceedings in Alabama to have the parole revocation reversed. The Alabama Court of Criminal Appeals found that the initial parole decision was based upon incomplete information, was not in accordance with

the Parole Board's authority under Alabama law, and thus was void. Ellard v. State, 474 So.2d 743 (Ala. Crim. App. 1984). In affirming, the Alabama Supreme Court relied on a completely different rationale. That court concluded in a 5-to-4 decision, that the Parole Board has the inherent authority to reconsider and rescind a grant of parole so long as "the prisoner is accorded his due process rights." Ex parte Ellard, 474 So.2d 758, 763 (Ala. 1985).

Ellard subsequently filed a petition for habeas corpus in federal court. The district court, adopting the recommendations of the magistrate, concluded that because Ellard never had been released from prison confines, he did not have a liberty interest and thus "was not entitled to any federal due process protection." The court rejected as

"farfetched and meritless" Ellard's contention that the grant of parole by Alabama created a liberty interest by increasing his chances of eventual freedom should Georgia eventually grant him parole. The court also summarily rejected Ellard's claim that the Board denied him equal protection by treating him differently than all other parolees.

II. A LIBERTY INTEREST?

The Due Process Clause of the fourteenth amendment to the United States Constitution provides that no state "shall deprive any person of life, liberty, or property without due process of law." Although "[l]awful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen," prisoners nevertheless "may claim the protections of the Due Process Clause." Wolff v. McDonnell, 418 U.S. 539, 555-56,

94 S.Ct. 2963, 2974, 41 L.Ed.2d 935 (1974). Yet, "the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed." Id. at 556m 94 S.Ct. at 2975. Consequently, prisoners "retain only a narrow range of ... liberty interests" protected by the Due Process Clause. Hewitt v. Helms, 459 U.S. 460, 467, 103 S.Ct. 864, 869, 74 L.Ed.2d 675 (1983).

Those liberty interests of prisoners that are protected by the fourteenth amendment "arise from two sources-the Due Process Clause itself and the laws of the State." Hewitt v. Helms, 459 U.S. 460, 466, 103 S.Ct. 864, 869, 74 L.Ed.2d 675 (1983). For a protected interest to

arise from the Due Process Clause itself, there must be in "the nature of the interest" some qualities that are inherently deserving of protection. See Morrissey v. Brewer, 408 U.S. 471, 482, 92 S.Ct. 2593, 2601, 33 L.Ed.2d 484 (1972). Due to "the necessary withdrawal or limitation of many privileges and rights" that results from lawful incarceration, Price v. Johnson, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356, protected interests that arise purely from the Due Process Clause are restricted to "the most basic liberty interests in prisoners." Hewitt v. Helms, 459 U.S. at 467, 103 S.Ct. at 869. Thus, the Constitution itself does not guarantee either parole, Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 2103, 60 L.Ed.2d 668 (1979),

or good-time credit for satisfactory behavior, Wolff v. McDonnell, 418 U.S. 539, 557, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974), nor does it protect against either the transfer from one prison to another, Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2632, 49 L.Ed.2d 451 (1976), or "administrative segregation" within a particular prison, Hewitt v. Helms, supra. Once an individual has been released into society under the constraints of either parole or probation, however, the resulting freedom, "although indeterminate, includes many of the core values of unqualified liberty" and thus inherently "falls within the protection of the Fourteenth Amendment." Morrissey v. Brewer, 408 U.S. at 482, 92 S.Ct. at 2601 (parole); Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656

(1973) (probation); see also Vitek v. Jones, 445 U.S. 480, 493, 100 S.Ct. 1254, 1264, 63 L.Ed.2d 552 (1980) (involuntary confinement for criminal conviction that its imposition must be according to strictures of Due Process Clause).

In considering whether Ellard's parole by the State of Alabama into the custody of the State of Georgia created a constitutionally protected interest, the district court examined primarily the nature of the interest immediately created by the grant of parole. See Morrissey v. Brewer,, 408 U.S. at 483, 92 S.Ct. at 2601. Concluding that Ellard has not received any liberties because of the parole and [that] the possibility of future liberty is speculative," the court decided that Ellard's parole did not create a protected liberty interest.

If the nature of the liberty created by the parole were the only basis for determining that the interest deserves protection by the Due Process Clause, we might be inclined to agree with the conclusion of the district court. As we have noted, however, a liberty interest may also arise from state laws. See, e.g. Hewitt v. Helms, supra; Vitek v. Jones, 445 U.S. at 488, 100 S.Ct. at 1261 (1980); Whitehorn v. Harrelson, 758, F.2d 1416, 1422 (11th Cir. 1985). This occurs when a state places "substantive limitations on official discretion." Olim v. Wakinekona, 461 U.S. 238 at 249, 103 S.Ct. 1741 at 1747, 75 L.Ed.2d 813 (1983). Thus, for example, although "the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison," once a state has "created the right to good time" and has established

standards for its revocation, "the prisoners's interest has real substance" and falls within the protections of the fourteenth amendment. Wolff v. McDonnell, 418 S.Ct. at 557, 94 S.Ct. at 2975. Similarly, although the mere possibility of parole provides simply "a hope that is not protected by due process," a state might create by statute "an expectancy of release [that] ... is entitled to some measures of constitutional protection." Greenholtz, 442 U.S. at 11, 12, 96 S.Ct. at 2105, 2106 (1079); see also Vitek v. Jones, 445 U.S. at 489, 100 S.Ct. at 1262 (liberty interest against transfer to mental hospital created by "objective expectation, firmly fixed in state law and official penal complex practice").

As was correctly noted in the magistrate's report adopted by the district court, the Alabama parole statute

frames the Parole Board's authority in discretionary terms, and thus does not create for Alabama prisoners a protected liberty interest in the expectation of parole. See Thomas v. Sellers, 691 F.2d 487 (11th Cir. 1983). We are not here confronted, however, with a claim that a liberty interest in parole arises from the mandates of the statute itself. Rather, the issue is whether a liberty interest arose from state law as a result of the Parole Board's decision to exercise its discretionary authority to grant parole to Ellard. We must determine, then, whether having exercised this discretionary authority, the Parole Board was constrained by "substantive limitations" on its authority to rescind a parole decision. See Olim v. Wakinekona, 461 U.S. at 249, 103 S.Ct. at 1747.

In arguing that the Board's grant of parole to Ellard did not create a constitutionally protected liberty interest, the State claims that the parole granted to Ellard was simply a "transfer" to another state's prisons. The State concedes that Ellard technically received a "parole," [2] but contends that the existence of a liberty interest should depend upon the substance of the action and not upon the words or form used to accomplish it. This argument, however, simply begs that the question whether a liberty interest is created by state law. Contrary to the

[2]Somewhat contradictorily, the State also urges us to accept the conclusion by the Alabama Court of Criminal Appeals that the Parole Board was without the statutory authority to do any more than transfer Ellard to the custody of another state. See Ellard v. State, 474 So.2d at 752-753 As we discuss in note 8, infra, this conclusion implicitly was rejected by the Alabama Supreme Court. 474 So.2d at 759-60.

state's contentions, words and from do matter. Indeed, they are the essence of a substantive liberty interest created by state law. As the Supreme Court has made clear, where a claimed liberty interest does not arise from the Due Process Clause itself, "[t]he ground for any constitutional claim, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising" the claimed liberty interest. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 465, 101 S.Ct. 2460, 2465, 69 L.Ed.2d 158 (1981). The Due Process Clause, in short, prohibits the states from negating by their actions rights that they have conferred by their words.[3] The states of course, may elect

[3]If, as the State contends, words and form did not matter, the Supreme Court could not have concluded in Greenholtz, supra, that the language of the challenged state statute created a

not to confer rights, such as parole, that are not inherent in the Constitution. But once a state does choose to confer such a right, the prisoner's interest has "real substance," and the right can be revoked only under the limitations imposed by the Due Process Clause. Wolff v. McDonnell, 418 U.S. at 557, 94 S.Ct. at 2975; see Vitek v. Jones, 445 U.S. at 490-91, 100 S.CT. at 1262-63.

Here, by the State's own concession, Ellard formally was granted "parole" under Alabama law. Despite the

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[3]Footnote continued from page 39

constitutionally protected interest in parole, nor could the Court similarly have concluded in Wolff v. McDonnell, supra, that the state statute alone created a constitutionally protected liberty interest in good-time credits. If substance rather than language were the sole touchstone for the existence of a liberty interest, the Court in these cases would have looked only to the actions of the states.

State's arguments to the contrary, Ellard's release into the custody of another state does not minimize the fact that, under Alabama law, this event placed substantive limits on the state's authority to return him to an Alabama prison.[4] Although the Alabama prison system retains "legal custody" over parolees, prisoners granted parole are entitled "to go outside of prison walls and enclosures" under conditions prescribed by the Parole Board. Ala. Code § 15-22-26 (1975). The parole statute provides for the return of a

[4]Because Ellard was released from the custody of the State of Alabama, the State's reliance on Jago v. Van Curen, 454 U.S. 14, 102 S.Ct. 31, 70 L.Ed.2d 13 (1981) (per curiam), is misplaced. In Van Curen, the habeas petitioner was informed that he would be granted parole, but the parole decision was rescinded before the parole went into effect. Here, although Ellard has not been released from prison, his parole from the Alabama prison was effected by his transfer to Georgia.

parolee to prison only if the parolee violates the conditions of parole, Ala. Code § 15-22-32, of if the parole is deemed void due to the failure of the parole board to follow the statutory requirements in granting parole, see Ala. Code § 15-22-40. Nowhere does the statute expressly or impliedly provide the Parole Board the unlimited authority to revoke a parole that has been granted.[5] Indeed, the statute specifically states that "the limitations and restrictions on the powers of the board or the members thereof shall be strictly construed."

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[5]Of course, if such authority were provided, the Due Process Clause would prohibit its exercise at least to prisoners paroled into society. See Morrissey v. Brewer, 408 U.S. 471, 475, 482, 92 S.Ct. 2593, 2597, 2601, 33 L.Ed.2d 484 (1972) (holding that parolee has a liberty interest despite express statutory provision authorizing revocation of parole at any time).

Ala. Code § 15-22-38. See Ex parte Ellard, 474 So.2d at 766, (Emby, J., dissenting) (noting statutory restrictions on Parole Board's authority). In view of the statutory restrictions on the authority of the Parole Board to revoke a parole, we conclude that Ellard had a constitutionally protected liberty interest.[6]

[6]The restrictions on the Parole Board's authority to revoke a parole also require us to reject the State's contention that Ellard's claim became moot upon his transfer back into the custody of Georgia following the revocation of his parole. Under the terms of the transfer, Ellard would be returned to the custody of Alabama should he ever receive parole from his Georgia sentence. If his Alabama parole is reinstated, however, Ellard would be entitled to release into society upon parole by Georgia. Hence, Ellard clearly retains an interest in challenging the revocation of his Alabama parole. See Jago v. Van Curen, 454 U.S. at 21 n. 3, 36 S.Ct. at 36 n. 3; cf. 347, 348, 46 L.Ed.2d 350 (1975) (per curiam) (habeas petition challenging parole procedures rendered moot by petitioner's "complete release from supervision").

These statutory provisions notwithstanding, the State contends that the Alabama Supreme Court upheld the Board's actions under the rationale that the Board has the inherent authority to "rescind its actions" once "it determines that it has made a mistake in carrying out its duties." Ex parte Ellard, 474 So.2d at 763. This interpretation of the Board's authority, the State contends, is a matter of state law that is binding on this court. Certainly, as the state suggests, the construction of a state's laws by its own courts may be of benefit in determining whether the laws create a constitutionally protected liberty interest. See Greenholtz, 442 U.S. at

12, 99 S.Ct. at 2106.[7] Here, however, the decision by the Alabama Supreme Court does not compel a decision that Ellard had no liberty interest in his parole. To the contrary, implicit in the Alabama Supreme Court's majority opinion are the assumptions that Ellard in fact was granted a parole and that this event

[7]On the other hand, the question whether state laws create a federally protected right never could depend exclusively on the construction of those laws by a state court. Cf. Logan v. Zimmerman Brush Co., 455 U.S. 422, 432, 101 S.Ct. 1148, 1156, 71 L.Ed.2d 265 (1982) (rejecting state court's decision that statute did not create property interest where result "would allow the State to destroy at will virtually any state-created property interest"). A state court's interpretation of a statute might be so inconsistent with the statute's language and history that the state court decision itself would be a "wholly arbitrary and irrational" action in violation of due process. See Martinez v. State of California, 444 U.S. 277, 282, 100 S.Ct. 553, 556, 62 L.Ed.2d 481 (1980); cf. Douglas v. Buder, 412 U.S. 430, 432, 93 S.Ct. 2199, 2200, 93 S.Ct. 52 (1973) (finding due process violation in "unforeseen" construction of state law to justify rescission of probation).

created a liberty interest sufficient to trigger the procedural components of the Due Process Clause.

The Alabama Supreme Court made clear that the legal issue was "whether a parole board can revoke a parole." 474 So.2d at 762. This statement of the issue necessarily assumes that, under state law, a parole was granted.[8] Moreover, the court expressly stated that a parole could be revoked only if "the prisoner is accorded his due process rights." Id. at 763. Again, this express limitation of the Board's ability to revoke parole necessarily assumes that a liberty interest was created by the grant

[8]By so defining the issue, the Alabama Supreme Court implicitly rejected the conclusion of the Alabama Court of Criminal Appeals that the Parole Board was without authority to grant a prisoner parole into the custody of another state. See 474 So.2d at 752-753.

of parole to Ellard.[9]

[9]The state supreme court majority did state that "Ellard did not have a constitutionally protected liberty interest." 474 So.2d at 760. This statement, however, was based exclusively on the majority's conclusion that the state "parole statutes do not create a 'liberty interest' that cannot be revoked.' Id. at 759. Yet, as noted previously, the issue presented is not whether the statute itself creates a liberty interest, but whether a liberty interest was created by the action of the Parole Board in granting parole to Ellard. Although the Alabama Supreme Court majority did not specifically address this issue, the majority's conclusion that "Ellard was entitled to a due process hearing," id at 760, 763, necessarily assumed that a liberty interest arose from the grant of parole. Indeed, in considering whether the Parole Board could reconsider and revoke Ellard's parole, the majority gave no consideration to the fact that Ellard had not been released into society but into the custody of another state. Rather, the court analyzed the question in terms of whether the Board could reconsider any parole that had been granted, regardless of whether the parolee was released to another prison system or into society at large. The State does not question that a prisoner who has been paroled into society has a constitutionally protected liberty interest in parole. See Morrissey v. Brewer, supra.

The Alabama Supreme Court did not conclude that, under state law, the grant of parole to Ellard did not place substantive limitations on the authority of the Parole Board to rescind the decision. Rather, the court merely determined that, in spite of the substantive limitations on the Parole Board's authority to reconsider a grant of parole, the Board's revocation of Ellard's parole did not violate the Due Process Clause.[10] This conclusion regarding the scope of the protection of the Due Process Clause, however, concerns a matter of federal law of which the

[10] In determining that the Parole Board had the authority to revoke Ellard's parole, the majority of the Alabama Supreme Court did not consider the language, structure, or history of the Alabama parole statute. Instead, relying exclusively on Tracy v. Salamack, 572 F.2d 393 (2nd Cir. 1978), which upheld the revocation by the state of New York of work release for various classes of

federal courts have the authority, and, indeed, the obligation, to make an independent determination. See, e.g., Vitek v. Jones, 445 U.S. at 490-91, 100 S.Ct. at 1262-63.

III. WHAT PROCESS IS DUE?

A.

Our determination that Ellard has a protected liberty interest in parole does not end our inquiry. Ellard contends that his parole must be reinstated because the Due Process Clause permits a revocation of parole only if there is a

[10]Footnote continued from page 48

offenders, the majority first concluded that the Due Process Clause does not prohibit a state parole board from reconsidering and revoking a parole that has been issued. Ex parte Ellard, 474 So.2d at 762. From this conclusion, the majority then reasoned that the Alabama Parole Board "was not powerless to rescind its actions." Id. at 763. The court's resolution of the issue thus turned primarily on the federal law question of the scope of the protection of the Due Process Clause, and not on the state law question of the authority granted by the parole statute.

violation of a parole condition. The state argues, however, that Ellard's parolw was void as a matter of state law and thus that its revocation, after a hearing, was consistent with the procedural mandates of the Due Process Clause. The state claims, in essence, that if Ellard did have a constitutional protected liberty interest, he received all the process that he was due.

It is now well established that when a liberty interest arises out of state law, the substantive and procedural protections to be accorded that interest is a question of federal law. See Bearden v. Georgia, 461 U.S. 660, 665 n. 7, 103 S.Ct. 2064, 2069 n. 7, 76 L.Ed.2d 221 (1983); Vitek v. Jones, 445 U.S. at 490-91, 100 S.Ct. at 1262-63; cf.

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 540-42, 105 S.Ct. 1487, 1492-93, 84 L.Ed.2d 494 (property interest). Consequently, if Ellard was granted a valid parole, the substantive constraints of the Due Process Clause would permit the parole to be rescinded only if Ellard violated a parole condition. See Bearden v. Georgia, 461 U.S. at 665 n. 7, 103 S.Ct at 2069 n. 7; Douglas v. Buder, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973) (per curiam). This federal substantive limitation on the authority of a state to rescind a valid parole does not suggest, however, that the state could rescind an invalid parole only upon the violation of a parole condition. There is little doubt, for example, that, consistent with the Due Process Clause, a state could revoke

a parole that was mistakently granted to the wrong individual. Likewise, the Due Process Clause would not prohibit a state from declaring void a parole that was granted in clear violation of the state's parole guidelines, where, as here, the parole statute expressly provides for such a contingency, see Ala. Code § 15-22-40.

In view of the authority of the states under the federal constitutional law to declare void an illegally granted parole, the state contends here that the question whether a parole in fact is void is purely a matter of state law. Thus, the state claims, the federal habeas courts are bound by the decision by the Alabama Court of Criminal Appeals that Ellard's parole was void. We disagree.[11] Although the Constitution does not

prohibit a state from declaring void a previously granted parole, the state's authority to do so is limited by the procedural and substantive requirements of the Due Process Clause. If this were not so, simply by declaring a parole void a state could effectively escape the Due Process Clause's restrictions regarding the revocation of parole. Consequently, before a state can declare a parole void, the parolee must be accorded procedural protections similar to those that apply when a valid parole is to be revoked. See Morrissey v. Brewer, 408 U.S. at 488-89, 92 S.Ct.

[11]We disagree also with Ellard's contention that this decision of state law was reversed by the Alabama Supreme Court. In contrast to the court of appeals' conclusion that Ellard was only transferred to Georgia, see footnote 8, supra, the issue of voidness was not implicitly or explicitly rejected by the supreme court majority.

at 2603-04 (suggesting minimum procedural requirements that must accompany parole revocation). Furthermore, the substantive protections of the Due Process Clause would permit a state to declare a parole void only if a clear departure from established statutory and regulatory guidelines substantially undermined the Parole Board's decision "that the State's penological interests do not require [continued] imprisonment." See Bearden v. Georgia, 461 U.S. at 469-70, 103 S.Ct. at 2071.

B.

Because the district court dismissed Ellard's petition on the basis of the pleadings, we have an insufficient factual record upon which to determine whether the state's nullification of the parole satisfied the procedural and substantive requirements of the Due Process Clause. Consequently, we must

remand this case for the district court to conduct an evidentiary hearing.[12] Due to the novel legal questions posed by Ellard's substantive due process claim, however, we deem it appropriate to provide some guidance for the district court in evaluating the facts that are likely to be presented.[13]

In evaluating the evidence regarding the validity of Ellard's parole

[12]In addition to his due process claims, Ellard also challenged the rescission of his parole on equal protection grounds. In dismissing Ellard's habeas petition, the district court, adopting the magistrate's recommendation, concluded that the viability of the equal protection claim was dependent upon the existence of a liberty interest. We need not consider the validity of this determination. In view of our conclusion that the grant of parole to Ellard did create a liberty interest, the district court should reconsider the equal protection claim on remand.

[13]The standards for considering Ellard's procedural due process claim are adequately set forth in Morrissey v. Brewer, supra, and subsequent cases.

the district court should be mindful that the issue to be decided is not whether the court would have granted parole on the basis of all the evidence presented, or even whether, on the basis of the additional evidence, the Parole Board acted wisely in declaring Ellard's parole void. Rather, the issue is whether, as a matter of state law constrained by the Due Process Clause of the federal Constitution, the initial parole granted to Ellard was void. As we have indicated, the Due Process Clause permits a state to declare a void only if the parole was issued after a clear departure from state law and this departure substantially undermined the determination whether the state's penological interests would be served by continued imprisonment. A state cannot, consistent with the Due Process Clause, declare a parole void simply on the basis

of additional information that was not previously considered.

With these principles in mind, we consider the reasons cited by the State in support of its contention that Ellard's parole was void. In upholding the Parole Board's nullification of Ellard's parole, the Alabama Court of Criminal Appeals concluded that the parole was void due to the failure of the Parole Board to: (1) obtain and consider certain evidence prior to granting the parole as required by Ala. Code § 15-22-25; (2) consider the "considerable evidence of public opposition" to the parole; and (3) ensure that Ellard have self-sustaining employment as required by Ala. Code § 15-22-28(d). See 474 So.2d at 752. Another ground for nullification that has been asserted but was not relied upon by the Alabama appeals court is that the

Parole Board failed, in violation of Ala. Code §15-22-31, sufficiently to consider the possibility that Ellard might "lapse into criminal ways."[14]

Applying the principles previously stated, we have little difficulty in rejecting as without merit all but the first of the asserted grounds for the nullification of Ellard's parole. The Alabama parole statute nowhere instructs the Parole Board to consider public opposition in determining whether a particular inmate is entitled to parole. The failure of the Board to consider public opposition in this case

[14]This rationale was one of two grounds stated by Attorney General Graddick in recommending that the Parole Board revoke Ellard's parole. The other rationale stated by the attorney general was that in granting the parole the Board relied upon files that were insufficient under Ala. Code § 15-22-25. In revoking the parole, the Board indicated only that it did so in accordance with the opinion of the attorney general.

thus could not constitute a deviation from established parole guidelines. Similarly without foundation is the conclusion by the Alabama Court of Criminal Appeals that the Parole Board improperly failed to ensure that Ellard would be employed. The Alabama parole statute prohibits granting a parole unless a majority of the Parole Board determines that the parole candidate "will be suitably employed ... or will not become a public charge." Ala. Code § 15-22-28(d) (emphasis added). Consequently, the parole could be deemed invalid only if incarceration in another state constituted a "public charge" under the terms of the parole statute. Such a construction of the statute, however, effectively would preclude parole into the custody of another state. As previously noted, the Alabama Supreme Court, in assuming that Ellard was

granted a parole, implicitly rejected such a construction.

Nor can Ellard's parole be deemed void due to the Parole Board's alleged failure to consider whether Ellard might "lapse into criminal ways." Section 15-22-31(a) of the Alabama Code authorizes the revocation of a parole where either a parole officer or a member of the Parole Board has "reasonable cause" to believe that a parolee "has lapsed, or is probably about to lapse, into criminal ways." This section, however, expressly applies only to "paroled prisoner," and thus cannot serve as a basis for concluding that a parole was granted in violation of established state guidelines.[15]

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[15] This does not suggest, of course, that the Board's alleged failure to consider the possibility of a lapse into criminal ways is entirely irrelevant in judging

The only remaining basis for conducting that Ellard's parole was void, then, is that the Parole Board failed to comply with the requirements of Ala. Code § 15-22-25 that the Board obtain certain information prior to granting a parole. In determining that the Board did not comply with this provision, the Alabama Court of Criminal Appeals noted, specifically, that the Board failed to obtain and consider: (1) a pre-sentence psychological report made of Ellard in 1971, (2) evidence of misconduct and criminal activity while Ellard was on escape in 1977, and (3) an escape in 1971. The State also contends in its brief before this court that the files

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Footnote continued from page 60

[15] the validity of a parole. Rather, any evidence regarding the likelihood of lapse should be considered in determining whether the Parole Board acted in violation of its duty under Ala. Code § 15-22-25. See infra.

relied upon by the Parole Board in granting Ellard parole contained an inaccurate and incomplete account of his crimes.

From the limited record before us, it appears that the failure of the Parole Board to consider the pre-sentence psychological report was a departure from the established parole guidelines. The Alabama parole statute requires the board to acquire from each parole candidate "information as complete as may be obtainable," including any existing availabe reports on the candidate's "psychiatric condition and history." Ala. Code § 15-22-25(a); cf. Sellers v. Thompson, 452 So.2d 460, 463 (Ala. 1984) (statute does not require Parole Board to order a psychiatric evaluation where a report does not exist). The report at issue apparently was both "existing" and "available" within the terms of the

statute, since, according to the Alabama Court of Criminal Appeals, it was in the files of the State Department of Corrections. 474 So.2d at 752.

Less evident from the record before us, however, is whether the absence of this report substantially undermined the Parole Board's determination that the State's penological interests would not be served by Ellard's continued imprisonment in Alabama. Among the factors that may be relevant to this determination are the thoroughness of the psychological evaluation, the lapse of time between the evaluation and the parole determination, evidence that was before the Parole Board regarding Ellard's rehabilitation, and the continued accuracy of the report as an indication of Ellard's psychological

state at the time his parole was issued.[16]

In contrast to that of the psychological report, the omission of the other alleged new evidence does not readily appear to have been so clearly a departure from the parole guidelines. The Alabama Court of Appeals apparently concluded that the absence of the certain evidence concerning Ellard's escapes in 1971 and 1977 rendered legally insufficient the "complete" investigation of Ellard's "social and criminal history" that is required by Ala. Code § 15-22-25((b) before a parole can issue. The Due Process Clause, however, does not

[16]At the evidentiary hearing, Ellard should be permitted, if he desires, to introduce evidence challenging the accuracy of the 1971 psychological report at the time of his parole. Cf. Morrisey v. Brewer, 408 U.S. at 489, 92 S.Ct. at 2604 (procedural due process requires that parolee may introduce evidence in parole revocation hearing). The State similarly should be permitted to present evidence supporting the validity of the report.

permit such an expansive reading of the statute to serve as a basis for declaring the parole void. The pre-parole investigation of Ellard contained a full account of Ellard's prison record, including the fact that he escaped for a seven-month period in 1978 until he recaptured in Arizona while attempting to use an altered money order. When this report was conducted, Ellard's file already contained a pre-sentence report detailing the relevant facts of his life prior to beginning his prison term. Particularly in view of the pre-sentence report then in Ellard's file, the pre-parole report cannot be deemed legally insufficient merely because it might have been more complete. Such a construction of the statute would enable the State to render void any parole by the simple expedient of producing additional information that previously

was not considered. This, as was previously noted, the Due Process Clause does not permit. Consequently, the absence of the additional evidence regarding the escapes can be considered a departure from established state parole guidelines only if the district court finds that the information was contained in "existing available records" that the Parole Board would have been required to obtain pursuant to Ala. Code § 15-22-25(a). Cf. Sellers v. Thompson, supra.

The details of Ellard's crimes require a similar finding before their absence in the parole determination can be deemed a departure from established State guidelines. Section 15-22-25(a) requires that the Parole Board must obtain certain information, including "a complete statement of the crime for which [the parole candidate] is then sentenced,

[and] the circumstance of such crime." Although the Alabama Court of Criminal Appeals did not refer to the incompleteness of the account of Ellard's crimes in upholding the Parole Board's nullification of the parole, the State now contends that this was one of the factors that rendered the grant of parole invalid. As with the pre-parole investigation, however, the information of Ellard's crimes contained in his parole file cannot be deemed so incomplete as to be legally insufficient. Contrary to the State's contention, a pre-sentence report contained in the file did not give the false impression that Ellard's crime begans as a friendly encounter; the report clearly indicates that Ellard "threatened them with a knife and made them get into his car." Nor, despite the State's assertions, did Ellard's parole file inaccurately inform

the Parole Board that Ellard's victims consented to sexual actions. Although the Alabama pre-sentence report stated only that "Ellard admits having sexual intercourse" with the murder victim, a report in Ellard's file that had been prepared by Georgia parole authorities accurately stated that Ellard had "abducted two victims in Alabama and ... raped each victim before murdering one and attempting to murder the other." As with the information regarding the escapes, the report of Ellard's crimes might have been more complete. The parole file, however, did inform the Board that Ellard had forcibly abducted his victims and sexually assaulted them prior to brutally murdering one and attempting to murder another. Thus, as with the escape evidence, the absence of a more detailed account of the crimes cannot be considered a departure from

State guidelines unless the information was contained in "existing available records" that the Board should have obtained pursuant to Section 15-22-25(a).

If the district court does find that the additional information was in existing records that the Parole Board should have considered, the court must determine whether the absence of the evidence substantially undermined the Parole Board's decision to grant Ellard parole. In making this determination, the court should consider factors similar to those previously stated in connection with the psychological report.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court, is REVERSED, and the case is REMANDED with instructions. FAY, Circuit Judge, dissenting:

Most respectfully I dissent. In the first instance, I do not believe being transferred from a jail in one state to a jail in another state grants one the freedom discussed in Morrissey, Gaynon or Vitek. In the second instance, the Alabama Court of Criminal Appeals has ruled that the decision of the Parole Board was made without the information required under Alabama law. This decision was affirmed, on different grounds, by the Alabama Supreme Court. Under these circumstances I would find that the petitioner had no liberty interest and affirm the ruling of the district court.

To argue, as does the majority opinion, that because the Alabama law places restrictions on the authority of the Parole Board to revoke a parole the petitioner has a constitutionally protected liberty interest is circular

reasoning. Alabama law declares that the decision of the Parole Board was void if based upon incomplete information required by the statutory scheme. Ala. Code § 15-22-40. It appears to me that the majority is now asking the federal district court to do exactly what has been done by the Alabama state courts. If the decision of the Parole Board was a nullity under Alabama law there existed no liberty interest and there can be no claim of denial of due process.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 86-7438

RICHARD MARK ELLARD
Petitioner-Appellant

V.

ALABAMA BOARD OF PARDONS AND PAROLES; EALON M. LAMBERT, JOHN THOMAS PORTER, AND RAY MORROW, members of the Board of Pardons and Paroles of the State of Alabama; and STATE OF ALABAMA

Respondents-Appellees

Appeal from the United States District Court for the Middle District of Alabama on petition(s) for rehearing and suggestion(s) of rehearing in Banc

Opinion August 19, 1987, 11 Cir., 198___, ___F.2d (September 24, 1987)

Before FAY and KRAVITCH, Circuit Judges, and MORGAN, Senior Circuit Judge

PER CORIAM:
(X) The petition(s) for Rehearing are DENIED and no memeber of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

[Irrelevent Part of Form deleted]

ENTERED FOR THE COURT:

/S/PHYLLIS KRAVITCH
United States Circuit Judge

* * * * *

IN THE UNITED STATES COURT OF APPEALS
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RICHARD MARK ELLARD
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V.

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Respondents-Appellees

Appeal from the United States District Court for the Middle District of Alabama

ORDER:

[Irrelevant part of form deleted]

(X) The motion of appellees Alabama Board of Pardons and paroles, et al for (X)stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including November 24, 1987, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the CLerk of the Supreme Court denying the writ, or upon expiration of the stay granted

herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

[Irrelevent Part of form deleted]

ENTERED FOR THE COURT:

/S/PHYLLIS KRAVITCH
United States Circuit Judge

APPENDIX C

RELEVANT ALABAMA STATUTES

CODE OF ALABAMA, 1975

TITLE 15.

CRIMINAL PROCEDURE.

CHAPTER 22.
PARDONS, PAROLES AND PROBATION.

Article 2.

Pardons and Paroles.

§15-22-20. Board of pardons and paroles - Creation; appointment, qualifications, oath, terms of office, compensation and removal of members; filling of vacancies; chairman; quorum; members not to hold other offices.

(a) There shall be a board of pardons and paroles which shall consist of three

members, but no two members of such board shall be residents of the same congressional district.

(b) Any vacancy occuring on the board, whether for an expired or unexpired term, shall be filled by appointment by the governor, with the advice and consent of the senate, from a list of three qualified persons nominated by a board consisting of the chief justice of the supreme court as chairman, the presiding judge of the court of criminal appeals and the lieutenant governor. The nominating board shall as soon as practicable after a vacancy occurs, whether for an expired or unexpired term, meet and select by majority vote the names of three persons to be submitted to the governor. It shall immediately thereafter submit its nominations to the governor, who shall make his appointment from such list within 10 days thereafter. Appointments made at times when the senate is not in session shall be effective ad interim. Any appointment made by the governor while the senate is in session must be submitted by him to the senate not later than the third legislative day following the date of the appointment; any appointment made while the senate is not in session shall be submitted not later than the third legislative day following the reconvening of the legislature. In the event the senate fails or refuses to act on the appointment within five legislative days after its submission, the appointment shall be void, and the person whose name was thus submitted shall not thereafter be reappointed. In the event an

appointee is not confirmed by the senate, the nominating board shall make three nominations; one of them shall be appointed, and his appointment shall be submitted to the senate as provided in this section. The nominating and appointing procedure required in this section shall be continued and followed until an appointment is made and completed.

(c) Members of the board shall be appointed for terms of six years commencing on July 1 in the years 1953, 1955 and 1957, and shall serve until their successors shall have been appointed and shall have qualified. Any person appointed to fill the vacancy for an unexpired term shall vacate the office upon the expiration of that unexpired term.

(d) The governor shall designate one of the members as chairman, and such chairman shal preside at sessions of the board.

(e) Each member shall take the constitutional oath of office and shall be subject to impeachment for any of the causes specified in section 173 of the Constitution; and the procedure in cases of impeachment shall be in the manner provided by section 175 of the Constitution; provided, however, that in the event the governor shall determine that any member of the board shall have become incapacitated by reason of physical or mental disability or illness to the extent that he cannot efficiently perform the duties of his office, he shall direct the attorney general to proceed to the determination of that

issue in an inquisition proceeding instituted by him in the circuit court of Montgomery county, Alabama. In the event the issue is determined in such court against the board member, the court shall declare the office vacant, and the same shall be vacated and a successor appointed, as provided in this section.

(f) Two members of the board shall constitute a quorum for the transaction of the official business of the board.

(g) The members of the board shall devote their full time to their official duties and shall hold no other office of profit during their incumbency.

(h) The annual compensation of the chairman and each associate member of the board of pardons and paroles shall be such amount as is provided by law. Such salaries shall be paid in equal installments from the state treasury in the same manner that salaries of other state officers are paid. (Acts 1939, No. 275, p. 426; Code 1940, T. 42, §§1, 1(3); Acts 1951, No. 599, p. 1030; Acts 1953, No. 822, p. 1105; Acts 1957, No. 195, p. 254; Acts 1967, No. 51, p. 378, § 1; Acts 1971, No. 71, p. 333, § 1.)

§15-22-23. Same - Meetings; action after notice.

(a) Meetings of the board of pardons and paroles shall be held at the call of the chairman or as may be determined by the board.

(b) No pardon, parole, remission of fine or forfeiture or restoration of civil and political rights shall be granted or ordered except in an open public meeting

of the board after due notice of the meeting shall have been given to each member of the board in such manner as the board may direct. (Acts 1939, No. 275, p. 426; Code 1940, T. 42, §4; Acts 1951, No. 599, p. 1030.)

§15-22-24. Same - Duties generally; annual report; badge and pistol of probation and parole officer included in retirement benefits; representation of applicant by state official.

(a) The board of pardons and paroles, hereinafter referred to as "the board," shall be charged with the duty of determining what prisoners serving sentences in the jails and prisons of the state of Alabama may be released on parole and when and under what conditions. Such board shall also be charged with the duty of supervising all prisoners released on parole from the jails or prisons of the state and of lending its assistance to the courts in the supervision of all prisoners placed on probation by courts exercising criminal jurisdiction and making such investigations as may be necessary in connection therewith, of determining whether violation of parole or probation conditions exist in specific cases, deciding, in the case of parolees, what action should be taken with reference thereto, causing, in the case of probationers, reports of such investigations to be made to the judges of the courts having jurisdiction of the probationers and of aiding parolees and

probationers to secure employment. It shall also be the duty of the board to personally study the prisoners confined in the jails and prisons of the state so as to determine their ultimate fitness to be paroled.

(b) Between October 1 and December 31 of each year, the board shall make a full report of its activities and functions during the preceding year, and such report shall be prepared in quadruplicate, with one copy thereof lodged with the governor, one filed in the office of the secretary of state, one filed in the office of the department of archives and history, and one copy retained in the permanent records of the board.

(c) The board may accept grants, devices, bequests or gifts and make expenditures therefrom for the operations of the board and not individually as board members.

(d) The board shall have the power and authority to enter contracts to accomplish the objectives of the board.

(e) The board may adopt policy and procedural guidelines for establishing parole consideration eligibility dockets based on its evaluation of a prisoner's prior record, nature and severity of the present offense, potential for future violence, and community attitude toward the offender.

(f) Any person who, at the time of his retirement, is employed by the board of pardons and paroles as a probation and parole officer, shall receive as part of his retirement benefits, without cost to him, his badge, and pistol.

(g) The board is hereby authorized and empowered to promulgate rules and

regulations to establish a program that will authorize the board to expend state moneys not to exceed $250.00 per year for awarding recognition incentive awards for outstanding employees.

(h) No state official shall appear or otherwise represent an applicant before the board for any consideration or thing of value unless said official was counsel of record for the applicant during a trial or hearing in the regular judicial process that led to said applicant's present status; however, no state official shall be prohibited from appearing without consideration before the board or board panel on behalf of an applicant.

(i) The board shall have the power, authority, and jurisdiction to conditionally transfer a prisoner to the authorities of the federal government or any other jurisdiction entitled to his custody to answer pending charges or begin serving a sentence in response to a properly filed detainer from the other jurisdiction. Such conditionally transferred prisoner shall remain in the legal custody of the warden of the institution from which he was transferred. Should any such conditionally transferred prisoner satisfy all detainers against him prior to completion of his Alabama sentence, said prisoner shall not be released from custody without further order of the board of pardons and paroles.

(j) The board and its agents shall have the power and authority to administer oaths and affirmation, examine witnesses and receive evidence on all matters to be considered by the board. (Acts 1939, No. 275, p. 426; Code 1940, T. 42, §5;

Acts 1951, No. 599, p. 1030; Acts 1982, No. 82-153, §4.)

§15-22-25. Investigation and report on sentenced prisoner's social and criminal records.

(a) As to each prisoner sentenced and received in the jails and prisons of the state of Alabama, it shall be the duty of the board of pardons and paroles, while the case is still recent, to cause to be obtained and filed information as complete as may be obtainable at that time with regard to each such prisoner. Such information shall include a complete statement of the crime for which he is then sentenced, the circumstances of such crime, the nature of his sentence, the court in which he was sentenced, the name of the judge and district attorney and copies of such probation reports as may have been made as well as reports as to the prisoner's social, physical, mental and psychiatric condition and history. It shall be the duty of the clerk of the court and of all probation officers and other appropriate officials to send such information as may be in their possession or under their control to the board upon request. The board shall also at that time obtain and file a copy of the complete criminal record of such prisoner that may exist. When all such existing available records have been assembled, they shall be presented to the board or to some officer designated by it, who shall determine whether any further investigation of such prisoner is necessary at that time and, if so, the

nature of such investigation, and the board shall thereupon order it to be made. Such investigation shall be made while the case is still recent, and the results of it with all other information shall be filed in the office of the board so as to be readily available when the parole of such prisoner is being considered.

(b) The board shall not act on any application or case until a complete investigation of the prisoner's social and criminal record has been made by a parole officer and a written report thereof made a part of the prisoner's file. (Acts 1939, No. 275, p. 426; Code 1940, T. 42, §6; Acts 1951, No. 599, §1030.)

§15-22-26. Standards for release of prisoners on parole.

No prisoner shall be released on parole merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board of pardons and paroles is of the opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society. If the board shall so determine, such prisoner shall be allowed to go upon parole outside of prison walls and enclosure upon such terms and conditions as the board shall prescribe, but to remain while thus on parole in the legal custody of the warden of the prison from which he is paroled until the

expiration of the maximum term specified in his sentence or until he is fully pardoned. (Acts 1939, No. 275, p. 426; Code 1940, T. 42, §7; Acts 1951, No. 599, p. 1030.)

§15-22-27. Pardon or parole of person having death sentence commuted to life imprisonment.

(a) Any person whose sentence to death has been commuted by the governor to life imprisonment shall not thereafter be eligible for a pardon unless sufficient evidence is presented to the board of pardons and paroles to satisfy it that such person was innocent of the crime for which he was convicted, the board votes unanimously to grant such person a pardon, and the governor concurs in and approves the granting of the pardon.

(b) Any person whose sentence to death has been commuted by the governor to life imprisonment shall not be eligible for a parole from the board of pardons and paroles until he shall have served at least 15 years of such life sentence, and any parole granted contrary to the provisions of this subsection shall be void.

(c) This section shall not be construed to deny any person whose sentence of death has been commuted to life imprisonment the right to apply to the courts of this state for such remedy as such person is entitled to under the laws of Alabama. (Acts 1951, No. 804, p. 1401, §§1, 2.)

§15-22-27.1. Parole of persons convicted of certain felonies or attempts and having been previously convicted of felonies or attempts resulting in serious physical injury.

Any person convicted of any act, or attempt to commit the act, of murder, rape, robbery or assault with a deadly weapon, the commission of which directly and proximately resulted in serious physical injury to another and the commission of which follows within five years a previous conviction of another felony, or attempt thereof, resulting in serious physical injury to another, shall upon conviction serve such sentence as may be imposed without benefit of parole, notwithstanding any law to the contrary. (Acts 1977, No. 639, p. 1087.)

§15-22-27.2. Parole of persons sentenced to life imprisonment upon second convictions of Class A felonies.

In all cases where a criminal defendant has been convicted of a Class A felony committed after a previous conviction of another Class A felony, and such second conviction results in a sentence to imprisonment for life, he shall not be eligible for parole. (Acts 1977, No. 640, p. 1088.)

specify in writing the conditions of his parole, and a copy of such conditions shall be given to the parolee. A violation of such conditions may render the prisoner liable to arrest and reimprisonment.

(b) The board of pardons and paroles shall adopt general rules with regard to conditions of parole and their violation and may make special rules to govern particular cases. Such rules, both general and special, may include, among other things, a requirement that:

(1) The parolee shall not leave the state without the consent of the board;

(2) He shall contribute to the support of his dependents to the best of his ability

(3) He shall make reparation or restitution for his crime;

(4) He shall abandon evil associates and ways; and

(5) He shall carry out the instructions of his parole officer and in general so comport himself as such officer shall determine. (Acts 1939, No. 275, p. 426; Code 1940, T. 42, §9; Acts 1951, No. 599, p. 1030.)

§15-22-38. Duties of board mandatory; powers strictly construed.

The duties imposed upon the members of the board of pardons and paroles by this article are mandatory, and the limitations and restrictions on the powers of the board or the members thereof shall be strictly construed. (Acts 1951, No. 599, p. 1030.)

§15-22-39. Penalty for neglecting or failing to perform duty.

Any member of the board of pardons and paroles who knowingly or willfully neglects or fails to perform any duty enjoined upon him by the provisions of this article is guilty of a felony and, upon his conviction, shall be punished by imprisonment in the penitentiary for not less than one nor more than five years, and any offense as defined by section 36-10-14 by a member of the board shall also be a felony and be punishable as provided in this section. (Acts 1951, No. 599, p. 1030.)

§15-22-40. When pardon, etc., null and void.

Any pardon, parole, remission of a fine or forfeiture or restoration of civil and political rights granted, ordered or made contrary to the provisions of this article shall be null and void and shall have no force or effect. (Acts 1951, No. 599, p. 1030.)

APPENDIX D

DECISION AND OPINION
OF THE STATE COURT TRIAL COURT
[UNREPORTED]

IN THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

RICHARD MARK ELLARD,	)
	)
Petitioner,	)
	)CIVIL ACTION NO.
VS.	)CV 82-1216-K
	)
STATE OF ALABAMA, et al.,	)
	)
	)
Respondents.	)

O R D E R

This cause comes before this Court on Petition for Writ of Certiorari filed herein by petitioner Richard Mark Ellard requesting this Court's review of the actions of the Alabama Board of Pardons and Paroles relative to the parole of said petitioner. Following a careful consideration of the records submitted

and briefs of learned counsel, it is the opinion of the Court that the following findings and Order should be entered.

Richard Mark Ellard was sentenced on May 9, 1972 to a term of life plus twenty (20) years in the state penal system for the offenses of murder in the first degree and assault with intent to murder. He became eligible for parole in 1980 and was evaluated for that purpose in December of that year.

Following a parole hearing in early 1981, and with the consent of two of the three members of the Alabama Board of Pardons and Paroles, a certificate of parole was issued to Ellard on March 2, 1982. Ellard was then transferred to the Georgia penal system where he was to complete serving another life sentence for murder in the first degree. While incarcerated in Alabama, the State of

Georgia had an active detainer on Ellard.

The evaluation report contained in the Parole Board's file indicated that Ellard would become eligible for parole consideration in Georgia in May of 1981.

In April of 1981, the Parole Board served Ellard with a notice of violation of condition eight of his parole and stated as grounds therefor "new information". Attached to the notice was a detailed statement as to the nature of the "new information" relied upon. A probable cause hearing was held on May 14, 1981 after which the matter was referred to the Parole Board for a full revocation hearing.

A hearing was held before the Board on July 7, 1982 and a notice of revocation was issued on July 15, 1982. The revocation notice stated as grounds

for the Board's actions "Attorney General's opinion, 4-17-81" and "New Evidence."

Title 15, Chapter 22, Article 2 of the Code of Alabama (1975) contains the statutory provisions relative to the granting of pardons and paroles in the State of Alabama. Those duties and obligations as set forth in the Code are mandatory and the limitations and restrictions applicable to the Board are to be strictly construed. §15-22-38.

The exclusive authority to grant paroles in Alabama is vested in the Alabama Board of Pardons and Paroles. §15-22-36. In granting paroles, the Board is limited in its authority by the statutory provisions of Title 15, Chapter 22, Article 2 of the Code. Minimum standards for release on parole are stated in §15-22-26, and §15-22-29 sets

forth minimum standards for conditions of parole once an inmate is released.

It cannot be argued that a Parole Board may rescind a parole that has been legally issued nor can it revoke a parole without a good cause. Generally, paroles are revoked due to violations of the conditions of parole as set forth by the Parole Board under the auspices of §15-22-29.

Before the Parole Board may act on an application for parole, it is required that a complete investigation of the prisoner's social and criminal record be made by a parole officer and written findings be submitted to the prisoner's file which presumably will be placed before the Board. §15-22-25(b). Without such report, the Board is prohibited from acting on any application submitted to it.

In §15-22-40, it is provided that any parole issued in violation of the statutory provisions of Title 15, Chapter 22 is null and void and without effect.

In the instant case which is before this Court for review, it is apparent from the record that at the time Ellard's parole was granted, the Board did not have before it a complete investigative file on the inmate's social and criminal record. For that reason, at the time of issuance, the Board was in violation of §15-22-25(b) of the Code of Alabama.

Due to the strict construction and mandatory limitations and restrictions language in §15-22-38, the Board is required by law to follow the explicit statutory scheme in performing its functions as parole grantor.

It is the opinion of this Court that the Alabama Board of Pardons and Paroles

failed to fulfill its statutorily mandated function in the issuance of the Ellard parole and for that reason and pursuant to §15-22-40, the parole issued to Ellard was void ab initio.

It is the further opinion of this Court that the Alabama Board of Pardons and Paroles is vested with the authority to promulgate procedural guidelines for the review of the propriety of the granting of the initial parole under the provisions of §15-22-37.

Based upon the foregoing and after consideration of the record on submission, it is therefore,

ORDERED, ADJUDGED and DECREED that:

The actions of the Alabama Board of Pardons and Paroles of July 15, 1982 in the matter of Richard Mark Ellard is due to be and is hereby affirmed.

DONE this 31st day of August, 1983.

/S/H. MARK KENNEDY
H. MARK KENNEDY
CIRCUIT JUDGE

Charles A. Graddick
Joseph G. L. Marston, III

Ralph I. Knowles
Ira A. Burnim

APPENDIX E

MATERIALS FROM THE ALABAMA BOARD OF PARDONS AND PAROLES

I.

AT TIME OF SENTENCE REPORT, PART 1
SEPTEMBER 18, 1972
(PRE-PAROLE)

* * * * *

Form No. 2

STATE BOARD OF PARDONS AND PAROLES

MONTGOMERY

REPORT OF INVESTIGATION

Received
September 21, 1972
State Board of
Pardons and Parole
At time of Sentence X

Pre-Parole_____

Name Richard Mark ELLARD

Number 105, 115 County Blount

Alias None Age, Race & Sex W M-26

Days in Jail

Offense Murder First Degree
Assault WI to Murder

Sentence Life
20 years

Judge L.P. Waid D.A: Charles Robinson

Address 1440 Ginger Street
Gardendale, Alabama

Date of Conviction 5-9-72

LEGAL HISTORY:

1. Previous Offenses and Holdovers: No previous arrest in Blount County, however subject admits to several traffic arrests by both Birmingham Police Department and State Troopers in Birmingham and Jefferson County during the past several years. This will have to be verified by Jefferson County Probation Office.

2. PRESENT OFFENSE: Case No. 9551 -Murder First Degree. On September 4, 1971, Richard Mark Ellard killed Charlotte Parks in an abandoned isolated area in Blount County, Alabama. Both Parks and Ellard were Jefferson County residences. They according to the subject and a statement from Mrs. Conn had met at a bar in Birmingham and subject was drinking. Ellard, Charlotte Parks and one Nancy Conn drove to this area in Blount County where Ellard beat Miss Parks to death with what apparently was a heavy sharp metal instrument or tool. Ellard admits having sexual intercourse with this girl prior to this offense. Ellard has related of his own free accord, after being informed of his rights and his right to remain silent and consult an attorney that he had been

working day and night for some three or four days practically without any sleep and had been drinking beer off and on for three or four days. Ellard relates that all the details were spotty and confusing and he had periods of time that he did not remember everything. Ellard was indicted by the October 1971 Grand Jury for First Degree Murder. He subsequently plead guilty and on advice of his counselor and was sentenced to life imprisonment.

Case No. 9553 -Assault with intent to murder. This offense occurred at the same time and same place as the above murder, case 9551. All of the details are identical with the exception, of course, of the victim Mrs. Nancy Conn. Nancy Conn and Charlotte Parks both were picked up (forced by subject, who threatened them with a knife and made them get in his car) in the Birmingham area and taken in his car to the above mentioned site of the two offenses. Mrs. Conn was beaten with a heavy instrument or tool until she was apparently unconscious and left for dead. However, she subsequently came to and was able to alert a resident in this area, after she had been in a semi-conscious state for a period of two days, when this resident came to dump garbage. Mrs. Conn had memorized Ellard's tag number, and the arrest was a result of this. Ellard was indicted by the Blount County Grand Jury on AWIM Mrs. Nancy Conn in October 1971. He subsequently plead guilty on May 9, 1972, and was sentenced to 20 years in the State Penitentiary.

SOCIAL DATA:

(All items not verified, subject was a resident of Jefferson County and had never lived or worked in Blount County.)

1. Family Situation:

A. Parents: Father, Ralph Odgen Ellard, deceased, November 1964.

M-DC 9-22-72

Reportedly had a good reputation and at the time of his death was a foreman for a house moving company. He died of lung cancer.

Mother, Evelyn O'neil Brown Ellard, 1440 Ginger Street, Gardendale. Clerk at the Millinery Supply Company in Birmingham. Presently in good health.

B. Siblings:

Katherine Ellard Ankeny, age 37, 3713 Franklin Drive, Anniston; Judy Ellard (Albert) Brown, age 35, Gardendale. No brothers.

C. Offender:

1. Childhood: Ellard was born in Birmingham, Jefferson County, Alabama, and lived there all of his life, with the exception of the time he was in the military

service, and other short periods of time. He attended local schools and lacked 1/2 credit graduating from Phillips High School in Birmingham, when he quit in 1965. After this he worked various odd jobs and went into service on January 17, 1968, and reportedly was Honorably Discharged, December 5, 1969. His reported highest rank was Specialist Five. He served in Thailand and Viet Nam approximately 10 1/2 months.

2. Marital Status: Ellard has been married two times. In February of 1967 he married Jennie Kirkland, a Birmingham girl. They were divorced in May of 1970 in Jefferson County. In April of 1971, he married Brenda Darden McNail, age 23, a Birmingham girl and divorced her in July of 1971. Brenda, his second wife, had one child by a previous marriage. However, subject and neither of his wives had any children of their own.

2. Health: Ellard relates that he is in excellent health and he appears to be. There are no indications of any physical difficulties. This individual always held his composure, was very friendly, maintained an excellent personality, was not withdrawn or over-talkative. He appeared to have average emotional stability and possibly was somewhat above average intellectually.

3. Education: As previously stated, Ellard lacked 1/2 credit completing high school, however he subsequently obtained high school equivalent in military service and later attended Jefferson State Junior College in Jefferson County and the University of Alabama, Birmingham. He had approximately two years in both of these colleges (not verified).

4. Employment History: This individual's employment pattern is somewhat blurred. Most of his work, since finishing high school has been in the military service, or part time work while attending college. At the time of this offense, he was working for a Reeves Gulf Station on Highway 31, as a manager. He had previously worked for a Nelco Service Company and other part time jobs. He has no trade or skill.

5. Economic Status: Ellard has nothing of economic value other than his own personal belongings.

CHURCH, CLUBS AND COMMUNITY ACTIVITIES: Ellard has never belonged to any religious organization. He has related that he did have preference of Baptist church. He has been a member of the Gorgus Literary Society of Phillips High School. Ellard reads a lot and is somewhat talented artistically, as he enjoys painting and drawing.

Factors Contributing to Offender's Delinquency: Of course, this is impossible to determine. There quite probably is some collation of subject's lack of sleep and rest. His continued use of amphetamines and alcoholic beverages at and before the time of the offense. He has however, had no previous indication of any serious problems relative to violence in his early life or from the information that I have available.

Due to the extreme seriousness of these offenses I would highly suggest that a more detailed report be compiled by the Jefferson County Office relative to past history, especially school, previous offenses, employment, reputation and associates, etc.

Dated this the 18th day of September September, 1972.

/S/ FRANK M. FENDLEY
Frank M. Fendley
Oneonta Office

II

AT TIME OF SENTENCE REPORT, PART 2

November 7, 1972

(PRE-PAROLE)

* * * * *

Form No. 2

Received
November 9, 1972
Probation & Parole
Office

PRELIMINARY

Pre-Parole_____ At time of Sentence xx

Name Richard Mark Ellard

Number #105, 115 County Blount

Alias None Age, Race & Sex WM-26

Days in Jail

Offense Murder 1st Degree
Assault WI to Murder

Sentence Life/20 years

Judge L.P. Waid

Address 1440 Ginger Street
Gardendale, Alabama

Date of Conviction 5/9/72

LEGAL HISTORY:

1. Previous Offenses and Holdovers:

BIRMINGHAM PD 8-20-65 RD $25 Fine & CC

FULTONDALE PD 12-25-68 RSS $15 Fine & CC

PRESENT OFFENSE:

The Present Offense was submitted by the Oneonta Office.

SOCIAL DATA:

FAMILY SITUATION:

Parents: Father, Ralph Odgen Ellard, died in November of 1964. Mr. Ellard had an excellent reputation in the New Georgia area at the time of his death and was a Foreman for a house moving company. He died of lung cancer. Mother: Elaine Oneil Brown Ellard, lives at 1440 Ginger Street, Gardendale, Alabama. She is the owner and operator of the Millinery Supply Company in North Birmingham. She is presently in good health. Mrs. Ellard speaks very highly of Mark and states that she was sure he was under the influence of narcotics or was temporarily insane when he committed the present offense. Mrs. Ellard has an excellent reputation in the New Georgia area and in the vicinity of her home in Gardendale.

SIBLINGS:

Katherine Ellard Ankeny, age 37 lives at 3713 Franklin Drive, Anniston, Alabama. Judy Ellard (Albert) Brown, age 35, lives in Gardendale. She is a Dental Technician over on southside. Judy has an excellent reputation as well as does her husband Albert.

OFFENDER:

Ellard was born in Birmingham, Jefferson County, Alabama, and has lived there all his life with the exception of the time he was in military service and other short periods of time. Ellard was reared in a six room frame house in the New Georgia area by his parents. There was no problems during his childhood.

MARITAL STATUS:

Ellard married Jennie Kirkland Ellard Andrews February 10, 1967. They were divorced May 7, 1970. The divorce was granted to Mrs. Andrews under the grounds of cruelty. No children were born to this union. Mrs. Andrews does not feel Ellard would be a threat to society. Ellard would become violent if pushed too far.

On April 5, 1971, Ellard married Brenda Darden McNail, age 23, and divorced her on July 23, 1971. Brenda had one child by a previous marriage. She is presently employed by Scott Supply Company, Birmingham, Alabama, and lives at 619 11th Street Southwest. She stated Ellard was a good husband and was no threat to society.

11-9-72 M & DC

HEALTH:

Ellard is in good health both physically and mentally. The mother of Ellard stated Ellard was insane at the time of the present offense or on drugs. She states he never showed any sign of insanity prior to the present offense.

EDUCATION:

Ellard liked one half a credit completing Phillips High School in 1965. He had an average there of a D+ or C-. After he entered military service he obtained his high school equivalency in the service. He attended Jefferson State Junior College, Jefferson County, for a period of two years and was in his senior year at the University of Alabama, Birmingham, Alabama. While in Junior College he did not apply himself to his limit. After returning from service he made a lot better grades at the University of Alabama in Birmingham. No disciplinaries were listed at Phillips High School.

EMPLOYMENT HISTORY:

Mr. Bice of Nesco Service Company, 3813 First Avenue North stated that Ellard worked for him for a period of five years off and on. He stated Ellard was an exceptional employee and if and when Ellard were paroled he would consider him for re-employment.

Mr. Reeves, owner and operator of Reeve's Gulf Service Station, Highway 31 North, Birmingham, Alabama, reported Ellard had worked for him a good deal of time off and on. He stated Ellard was an excellent employee and he would gladly rehire him if given a chance.

ECONOMIC STATUS:

Ellard owns nothing nor does he owe anything.

MILITARY STATUS:

Subject entered the United States Army on January 18, 1968, and received an Honorable Discharge on December 5, 1969. He attained the rank of SP/5. His Army Serial Number is US 53845679.

CHURCH, CLUBS AND COMMUNITY ACTIVITIES:

According to Ellard's statement to Mr. Fendley he does not belong to any religious organizations. Ellard's mother claims he belonged to the Mt. Carmel Baptist Church, New Georgia Community. One of the elder's in the Mt. Carmel Baptist Church, New Georgia, stated Ellard and his family quit attending their church and moved to another church when Ellard was approximately 14 years of age. There was no mention in the Phillips High School records of Ellard having been a member of the Gorgus Literary Society. Ellard is talented as an artist, still paintings.

REPUTATION AND COMMUNITY ATTITUDE:

Neighbors in the New Georgia Community or in the immediate vicinity of 4913 Lewisburg Road, North Birmingham, stated they could not understand how Ellard had committed the crime he had committed. They further stated that Ellard and his family were quiet, reserved people and did not associate much with anyone. One of the church workers who had worked in the Mt. Carmel Baptist Church with Ellard until he was age 14 had this comment to make, "he was quiet, sensitive and liked pretty things." She stated he was an obedient child.

One person who had known Ellard from childhood claimed he had masochistic tendencies which were described by this person as follows: "When he was a child he would pull legs off of bugs." This person is the only person out of ten references in the New Georgia area who knew Ellard who had anything to say of this nature. When other references was specifically asked about him having sadistic tendacies, none of them stated he had any tendencies of this sort. The person who stated he had sadistic tendencies volunteered his comments.

/S/WINFRED O. SMITHSON
WINFRED O. SMITHSON
PAROLE AND PROBATION
SUPERVISOR

III

PAROLE APPRAISAL

December 8, 1980

(PRE-PAROLE)

* * * * *

STATE OF ALABAMA

BOARD OF PARDONS AND PAROLES

Prison Holman

Set Date 2/81

Earliest Parole Date

Name Ellard, Richard Mark

Number 105115

Co. Blount

RSA WM-34

PAROLE PLAN: SSN 424-69-6671

Home: During interview, Ellard requested that he be paroled to the Georgia Department of Offender Rehabilitation. Records indicate that Ellard will be eligible for parole consideration in that state during May, 1981.

Job:

Program Report Req. Date _____

PENDING CASES:

HOLDOVERS: 1/24/78-Dept. of Offender Rehabilitation, Atlanta, Georgia-Murder. (Ellard has a Life sentence which was ordered to run concurrent with the Alabama Life sentences.)

IPO APPRAISAL

Parole Recommended: Yes XX No____

/S/THOMAS TARO 12/8/80
Signature Date

On 5/9/72 Ellard was sentenced to Life plus 20 for Murder I and AIM.

On 12/29/77 Ellard was received at Kilby after being recaptured from a Draper escape which occurred on 5/31/77. On 2/3/78 Ellard was transferred from Kilby to Holman as a close custody inmate. On 3/17/78 his custody was reduced from close to medium and he was assigned to Holman population. On 5/1/78 he was approved for training in the cabinet making school. Since that time, Ellard has remained in the trade school program and is described as an inmate having a very good training and conduct record, both in school and within the prison compound. On 7/29/80 Ellard was approved for IGT status. On 9/22/80 after graduating from the cabinet school, Elleard was transferred into the upholstry school for further training.

During interview, Ellard stated he is serving his first prison term and has never been on parole or probation. Rules

and regulations of parole were explained. Ellard described himself as a cabinet maker, due to learning this trade while in prison. Ellard further stated that prior to coming to prison he had completed 3 years of college in the Birmingham area.

Ellard appears to be in good health standing 5'10" and weighing 155 lbs. During interview, he exhibited a good attitude and attempted to show a great deal of remorse concerning the present offenses for which he is presently serving. Ellard attempted to defend his actions by stateing that at the time of the present offense, he was taking both amphetimines and drinking and does not remember what happened. During this interview, Ellard describes himself as being totally drug free since being in prison and states that he has not received drug counseling and does not feel it would be necessary for him to continue his drug free activities. In looking at Ellard's prison record, it appears that he has been an exceptional inmate except for his escape from the Draper facility.

DISCIPLINARY RECORD PAST TWO YEARS:

Disciplinaries:

5/31/77-Draper-Escape-Recap 12/28/77-Lost 18 months GT. (During interview, Ellard stated he was arrested in Pheonix, Arizona, while attempting to use an altered money order.)

5/16/80-10 months 2 days GT approved for restoration by the commissioner.

WARDEN'S REPORT

Parole Recommended: Yes X No ____

/S/C. E. JONES
Warden

REASON: _____

_____

3-2-81

B O C

12-16

PB Form 521, Rev. 3/80

IV

REPORT OF INVESTIGATION

APRIL 24, 1981

(POST-PAROLE)

* * * * *

STATE BOARD OF PARDONS AND PAROLES

Montgomery, Alabama

Received
April 28, 1981
State Board of
Pardons and Parole

Name Richard Mark ELLARD

Number 105,115

County Blount

Alias None

Age, Race & Sex WM

Days in Jail

Offense Murder 1st/Assault With Intent to Murder

Sentence Life/20 yrs

Judge I. P. Waid

Address 1440 Ginger st., Gardendale Al

Date of Conviction 5-9-72

Atty.

D.A. Charles Robinson

SSN:

Drivers License State and Number

FBI No.

LEGAL HISTORY:

1. Previous Offenses and Holdovers: In addition to the charges contained in this report subject was sentenced to a term of life imprisonment in Douglas County Georgia for the offense of Murder 1st, said sentence to run concurrent with the sentence in the cases detailed below. For purposes of this investigation the details in Blount County cases #9551 Murder 1st and case #9553 Assault With Intent to Murder have been combined:

DETAILS:

On 9-4-71 at approximately 1:00 a.m. two white females, Charlotte Parks and Nancy Conn, parked at a location between First Avenue and Second Avenue North, 11th Street, Birmingham, Alabama. They had pulled in next to a vehicle with a white male inside. This man was parked on the right side of the victim's car. Nancy Conn who was on the passenger side stated her window was rolled half way down. The man later identified as Richard Mark Ellard got out of his vehicle, walked over to thier car and leaned in the window and asked them did they know what time it was. Ms. Conn states that she

answered no but that it was around 1:00. He also asked were they going into that morgue, referring to a night club. Ms. Conn states that she answered in the affirmative and that she then turned back toward her companion, Charlotte Parks. Ms. Conn states that as she did so Ellard stuck a knife through the window and up to her throat, telling her not to move or he would cut her fucking off. Ms. Conn states that after a moment or so the subject got in the car beside her and made Charlotte Parks lock her door, take the keys out and put them in her purse. Ellard then apparently took both purses. After sitting in the car for a few moments Ellard then forced the victims to get into his car with all three in the front seat. He started the vehicle and after circling the office lounge in front of which they had been parked several times he proceeded North out of town on Highway 31. Ms. Conn states that Ellard made Charlotte Parks get down on the floorboard on the right side of the car so she could not be seen.

When the vehicle had turned off the main highway Ellard told Charlotte Parks to undress which she did until she was completely nude. After going down this secondary paved road for a time Ellard apparently turned off on a dirt road and proceeded until he came to what Ms. Conn states was an old mine shaft. Subject turned into the shaft road and stopped in a wooded area. At this point both Ms. Conn and Parks were made to get out of the car. At this time Ms. Conn states that she pleaded with Ellard at this time not to make her undress due to the fact

that she was having her period and couldn't therefore, she only undress down to her panties. Ms. Conn stated that Ellard then made them go to the rear of the car and either sit or stand beside one another. Ms. Conn states that Ellard kept calling Charlotte Parks blondie and her mama. She states at this point Ellard began playing with Charlotte Parks' breast and body and also told her to play with Charlotte which she said she was forced to do. This playing apparently involved playing with Charlotte Parks' breast and vagina. Ms. Conn states at this time the subject did not talk a great deal other than to tell her what to do. She states that at this time he also made her perform oral sex on him and continue to perform this oral sex until she got sick. She states that once she got sick he would then grab Charlotte's head and forced Charlotte down on him and make her perform the same act until she got sick. Ms. Conn further stated that this went on for a considerable length of time. Ms. Conn further stated that while the oral sex was going on that Ellard made her place her fingers in his rectum and much the same as he had forced her to do to Charlotte Parks. Ms. Conn further states that following the oral intercourse which both she and the victim, Parks, were forced to perform that he then raped Charlotte. The method of rape was that Ms. Parks was required to get up on the trunk of the car in such a position as to be directly in front of Ellard while he performed intercourse on her.

Ms. Conn states that while they were at this first location that Ellard did not undress and simply unzipped his pants in the front. Following the assaults at this location they were allowed to put their clothes back on with the exception of, in Ms. Conn's case her bra and panty hose. After they were dressed again both victims' hands were tied behind their backs and they were put back in the car in the front seat. She further stated that Charlotte parks had become somewhat histerical at this time and that Ellard slapped her at least three or four times. Ms. Conn also stated when interviewed that during the thirty to forty minutes that they were traveling this time that Ellard forced her to perform oral sex on him as they were driving down the highway. After driving for the above length of time Ms. Conn stated that they pulled off on another highway for about an hour then turned on to a dirt road and stopped again in a wooded area. At this time Ellard took both victims out of the car, took all of his cloths off and again sexually assaulted Charlotte Parks. She stated that during all this time there was little or no conversation on the part of Ellard other than the fact that when they were trying to plead eith him to let them go and not to hurt them, he continually told them to shut up. Ms. Conn states that following this latest attack on Ms. Parks subject acted a little bit more normal and seemed like he was listening to their pleas to not hurt them and let them go. She states, however, that after seemingly thinking about it for a few minutes he told them that he had to get rid of them since if he did no body would know who had none

it. At this time he began taking some articles out of the trunk of the car and in preparation of making them get back in. Ms. Conn states at this time she memorized the tag number of the vehicle which was 1A-46204. She states that it was daylight and had been for some time at this last location. Once back in the vehicle subject apparenly rode around for a short length of time after which he stopped and told them he was going to go to sleep for a while. During the time they were in the trunk this last time Ms. Conn states the Charlotte Parks kept chewing on the panty hose around her hands until she had bitten them in two and then she untied Ms. Conn. They apparently rode around quite a while on major highway and then again over some bumpy roads and then he stopped and Ms. Conn states she saw a little green hose come through a hole in the trunk and the car was started. She states that at this time she pushed the hose back down the hole. She states that after this Ellard came back to the rear of the car and saw the hose had falled to the ground, cursed about that, then pushed the hose back up in the hole. When Ms. Conn pushed it back down again he apparently cut her left index finger and small finger with a knife. At this time the victim stated that they tried to kick the back seat out so they could get some air and at that time Ellard came and unlocked the trunk and took them out. She states that he had changed clothes, at this time was wearing a pair of faded ragged shorts and a pair of sandles. As he took them out of the car he had a what Ms Conn termed a hugh stick in his hand and he began beating her on the head with the stick.

After hitting her with the stick both victims were then placed back in the trunk and they began driving again. Ms. Conn states that she passed out and that the next thing she knew they had stopped and he opened the trunk again and at this time took her out of the car with Charlotte holding on to her and pleading for him not hurt them again. He pushed Charlotte back into the trunk and closed it. Ellard then carried the Conn victim down to the small pond and held her head under water until she passed out.

Investigation by the Sheriff's Department of Blount County reveals that apparently following the attempted drowning of Nancy Conn subject was dragged to the edge of a large dirt embankment and thrown over the embankment by Ellard. In so far as can be determined by Ms. Conn she thinks this occurred at about 10:00 a.m. in the morning. Ms. Conn laid in the location where she was thrown for the remainder of Saturday and on into Sunday morning at which time she finally gained enough strength to get back up the embankment and move approximately eighty yards from where she had been thrown down the embankment. At this time she was found by a Mr. Earnest White who had come to the old Strip mine area to dispose of some garbage.

In her interview with this officer and her statement at the time of the offense Ms. Conn stated that when she woke up she was lying at the feet of the body of Charlotte Parks who was dead at that

time. The exact time of death of Charlotte Parks was not fixed in the autopsy report, however, the autopsy report is significant for a number of points are as follows: With the exception of lacerations or scratches which could have been caused by rocks or briars, there were a total of fifty-eight lacerations or punctures on the victim's chest, under her left breast, the nipple of her right breast, the left flank of the abdomen, and on both sides of the neck, as well as a large number of superficial lacerations across the middle of the abdomen which varied from 3/8" long to 3" long. The cause of death according to postmortum examination was the result of shock and hemorrage as well as cardiac failure following several stab wounds to the area of the left chest which penitrated the heart and lungs. At the time of this report no photographs, if found, will be included in a followup report.

It was also noted from the postmortum that the victim's hair was missing except for hair on her forelock and at the temples. When Ms. Conn was interviewed for purposes of the details above she stated that Charlotte Parks had a full head of hair when she last saw her alive, however, had been wearing a hair peace. Ms Conn was emphatic, however, in stating that Charlotte had long blonde hair. It, therefore, appears that the victim's hair was either cut off or pulled out at some during or after her death.

EVALUATION OF OFFENDER

PERSONAL HISTORY:

For information regarding subject's personal history see at time of sentence investigation dated 9-18-72 and at time of sentence investigation prepared by the Birmingham Office, date unknown. Most of the information contained in that report appears to be valid and current. However, this officer obtained a copy of a psychological report which was performed on Ellard prior to his sentence which is included as an enclosure to this report. This psychological which I note was not a part of subject's parole board file appears to contain some significant background data regarding sexual deviancy on the part of this inmate. In view of the fact that the report is or will be included in a final report, I will include only exerpts. On 11-30-71 this subject was admitted to Ward 9 East at the Bryce Mental Hospital for the purposes of a lunacy commission analysis. It is noted that Ellard stated to the doctor that the reason he was here was because he had these moods which he said he had at the time of his charges which he described as depression. In the interview Ellard admitted that dating back to the time he was approximately twenty-one years of age he had been exposing himself to women and states this gave him an excited feeling in his chest which he stated to the doctor he was unable to describe. This report goes on to illustrate other points that Ellard admitted such as masterbating in public, exposing himself in public and peeping in windows, etc. It is notable that inmate

admitted to the counseler at that time that he had abducted these girls whom he did not name in the interview and forced them into his car and that he admitted to having intercourse with the young pretty one. He further stated that this did lead to the thrill that he wanted in his stomach and chest which he had described as being pleasing to him in his previous sexual deviances. Apparently, in an effort to gratify this feeling in his stomach and chest he had the girls perform different acts on themselves and had them to perform oral sex on him. Ellard at that time admitted that this didn't do anything for him and that he tied them up, drove them around and had them go through the same act again. This seems to follow almost exactly the statement made by the victim, Ms. Conn. Most notably to this officer in reviewing this report of psychological is a statement on the last page which states that "He (Ellard) does says that he feels he has to perform more daring acts in order to get this feeling (the feeling in his stomach and chest) and that he is afraid of what he might do if had another chance. Note: The parenthisis are mine and are not a part of the quote. It is notable that the time subject was being interviewed for this lunacy commission he had previously victim Sandra D. Swisher whom he apparently kidnapped from the University of ALabama campus, Birmingham, in June 1971 and whose body was subsequently found near a reservoir in Douglas County, Douglasville, Georgia on 11-15-71. It is also notable that from what I have been able to learn about that offense the victim died from stab wounds and was disposed of near a reservior or

pond much the same as the two victims in this case. Although this officer says no claim to being a psychologist, there are two sexual deviant terms which might apply in this case. One is triolism which is the sexual deviancy known as an exhibitionist or a voyeurism as indicated by the exposing himself, masterbating in public and being a peeping tom. The second term is a piquerist or a sexual deviancy known as piquerism which manifests itself by stabbing, maiming, mutilating of victim. This deviancy may be indicated due to the number of stab wounds and lacerations, the location of laceration, i.e., the middle of the chest, under the left breast, the nipple of the right breast, the left flank of the abdomen, the fact that the hair of the head is missing in addition to a large number of superficial lacerations across the abdomen. These appear to be indications that that might be the case with Ellard. The point being that in my opinion if such were the case based on the psychological report, attached as an enclosure, subject would probably pose a high risk of recidivism.

Although during Ellard's 1977 Escape from custody while confined at Draper Prison this investigation has revealed no clear indications that he did threaten the victim, Nancy Conn. It does appear that subject violated the law in a number of ways which did not lead to his having been charged with any offenses. Although Ellard in so far as I can determine did not escape with a fellow prisoner the prisoner Eddie D. Anderson interviewed at Mt. Meggs by this officer stated that he was contacted on Ellard's behalf in an

effort to obtain a pistol. It does appear that Ellard must have obtained a pistol from some source as he was according to sources in the Hattiesburg, Mississippi area involved in using a gun in attempt to make a truck driver, Mr. A. L. Saucier, take him to I-59 which is Hattiesburg, Lamar County, Mississippi. This attempt was unsuccessful as Mr. Saucier according to newspaper accounts refused to do what Ellard told him to do, drove into a driveway and stopped at which time Ellard apparently panicked, got out of the vehicle and ran. It also appears evident from police reports and accounts of Ellard's escape during 1977 that he stole a 1972 Datson V210 automobile belonging to one Greggory Yestadt with whome he had been staying in Mississippi. It is notable that Mr. Yestadt was charged by Mississippi authorities with Harboring a Fugitive, however, disposition of those charges are unknown. There were apparently no charges of auto theft filed against Ellard in this case as the vehicle in question was recovered at 929 Valley Ridge Drive by Birmingham Police Sgt. Al Wallace. Information reveals that police were told where to find this vehicle by one Sheldon Perhase a local attorney who refused to say how he had learned of the car's whereabouts. In view of the fact that none of the information detailed above was contained in subject's Parole Board file, it is felt this information is such that although not charged with any new offense while on escape the circumstances are such that there appears to be little doubt Ellard did violate the law during the time he was on escape and these actions coupled with his past

history would tend to place his overall prognosis and suitability for parole in doubt.

It should be noted that a thorough review of subject's present file both institutional and Central Records file reveals no adverse comments from Department of Corrections personnel other than one from John Nagle referring to the holdover in effect by the Georgia authorities. There is a memo in the file that there are some charges (apparently eluding to the severity of his offense) which should be considered in determining his suitability for IGT. Note: This is also not in his Parole Board file but is in his prison jacket. There are numerous recommendations from Department of Correction officials that Ellard be granted IGT and atesting to the fact that he had been a model prisoner. On the surface it appears that his file was not significant when compared with other files I have seen regarding Murders serving time. It also appears that neither his prison jacket nor his Central Records file makes any great emphasis on the fact that inmate was a convicted sex offender with a serious sexual offense to his credit. This report reflects the status of subject's investigation up to this point. Any additional information received will be added as a supplement.

Signed and dated at Talladega, AL, on the twenty-fourth of April 1981.

/S/WALTER B. SMITH
WALTER B. SMITH
PROBATION AND PAROLE OFFICER

PB Form No. 111

PRELIMINARY PAROLE REVOCATION

HEARING

(POST-PAROLE)

* * * * *

MAY 14, 1982

STATE BOARD OF PARDONS AND PAROLES

Montgomery, Alabama

INTEROFFICE COMMUNICATION

DATE: May 14, 1982

TO: The Board

FROM: Kenneth Law - Troy District Supervisor

IN RE: Richard Mark Ellard

105,115

Blount County

Preliminary Parole Revocation Hearing On May 11, 1982, a preliminary parole revocation hearing was held for Richard Mark Ellard, #105,115, at Kilby Correctional Facility, Montgomery, Alabama. This defendant was represented by legal counsel Ralph Knowles and Ira Burnim. Prior notice of the charges and of the date for the hearing had been

given to the defendant and his attorneys.

At the beginning of this hearing, the hearing officer explained the purposes of the hearing. They are: 1. to determine whether or not probable cause existed in the charges. In that the hearing would be held in accordance with Morrissey v. Brewer, 408-US-471, the minimum requirements for revoking paroles were read to the defendant. They are (a) written notice of the claimed parole violations; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole. It was then explained that this was not a hearing to determine his guilt or innocence and that the Parole Board was not bound by my findings and recommendation. It was also explained that points that I might not have covered at this hearing might be covered at the later hearing.

You are Richard Mark Ellard, #105, 115. This subject acknowledged that he was Mark Ellard, #105, 115. On September 5, 1971, you were arrested by the Blount County, Alabama, authorities and charged with the offense of Murder 1st Degree and Assault to Murder. On May 9, 1972,

represented by legal counsel, you entered a plea of guilty in the Circuit Court of Blount County, Alabama, to Case #9551, Murder 1st Degree, at which time you received a life sentence in the penitentiary and Case #9553, Assault to Murder, at which time you received a sentence of 20 years in the penitentiary.

On March 26, 1976, the records indicate that you entered a plea of guilty to a charge of Murder in the Douglas Superior Court, Georgia, at which time you received a life sentence.

On March 2, 1981, the Alabama Board of Pardons and Paroles granted you parole to a detainer from the State of Georgia. You have been in the custody of either Alabama or the Georgia authorities since the date of your parole.

At this time the defendant's attorney, Mr. Burnim, objected to the use of the phrase "parole to a detainer" stating that the word detainer should not be used. I overruled this objection.

On April 16, 1981, the Alabama Board of Pardons and Paroles, through its Executive Director, David H. Williams, requested the Attorney General of Alabama to render an official opinion of whether or not the Parole Board had the power and authority to rescind, revoke, nullify and void a grant of parole which had been legally issued and executed in favor of a detainer warrant from another jurisdiction but prior to actual release

of the prisoner from prison custody of the community. (See exhibit #1.)

On April 17, 1981, the Alabama Attorney General issued his opinion in the affirmative (See exhibit #2).

On April 17, 1981, the Alabama Parole Board declared you delinquent as a technical violator under privisions of parole condition #8 (See exhibit #4).

At this time the hearing officer made it known to the defendant and his attorneys that there were several charges or allegations in the Notice of Parole Violation that I would not try to cover at this hearing. They were Item 2, Sec. C, D, and E of Exhibit #4.

At this time Mr. Burnim made it known that he would like to make several motions to the hearing officer. His first motion was to sequest the witnesses. This motion was granted. Mr. Knowles then questioned the subpoenaing power of the Parole Board and hearing officer. I explained to him we did not have this power. He then objected to the use of any hearsay evidence in the first degree would be allowed. He then objected to the Attorney General's opinion of April 17, 1981, stating that it was unconstitutional. This was overruled at which time he introduced exhibit #5 which was a motion to dismiss proceedings. The hearing officer explained to Mr. Knowles that he was not qualified to rule on motions of this type in a court of law was the vehicle for

this procedure. However, I made note of his objections for the record.

Before going further with the hearing, the hearing officer was asked by Mr. Knowles what was the purpose of the hearing or what was the hearing officer looking for from the witness. I explained to him that I would be looking for any new or additional information not available to the Parole Board at the time of parole on March 2, 1981, that might have a bearing on the outcome of this parole had it been available to the Board.

Prior to taking any further testimony, I introduced Exhibit #3, a certificate of Parole dated March 2, 1981, which was signed by Mr. Ellard, witnessed by J. D. White, Assistant Warden at Staton Prison dated February 27, 1981. This Certificate of Parole contained the conditions under which parole was granted. Mr. Ellard acknowledged his signature and the receipt of his copy of this certificate.

The first witness was Mr. Elmo Graves, Assistant Director, Board of Pardons and Paroles. His testimony was for the record and he testified that on April 2, 1982, he had visited Kilby Correctional Facility where he advised the defendant of the charges against him and of his rights. At that time the defendant requested a pre-parole revocation hearing. The hearing at the defendant's request, was set for May 5, 1982, to enable him to employ counsel. This request is reflected in Exhibit #4. The defendant's attorneys then questioned Mr.

Graves in regards as to who initiated or contacted Probation Officer Walt Smith to complete the investigation after April 16, 1981, at which time Mr. Graves stated that as Supervisor of Field Operations for the State Board of Pardons and Paroles, he contacted Mr. Smith.

At that time I again read from the record as follows: On April 8, 1982, Mr. Ellard, you requested, by letter that the Parole Board pay the expenses of an attorney, of your choice, to represent you. On April 19, 1982, you were notified by mail that the Board would be unable to employ an attorney of your choice. Later, at your attorney's request, this hearing was continued until May 11, 1982, at 9:00 A.M., to be held in the Kilby Institution.

The second witness, Mr. Walt Smith, Probation Officer from Talladega, Alabama, testified that after he had been contacted by the Parole Board, he visited Birmingham where he talked with Mrs. Conn, the victim. He stated in essence that Mrs. Conn informed him that she had no direct evidence of Ellard stalking her other than things she had been told. Mr. Smith then stated that he visited Blount County where he talked with an informant who had been assigned to the same cell with Mr. Ellard in 1971. This informant stated that Ellard had made threats against the victim and that Ellard had offered him $500.00 to do away with the victim. Mr. Smith stated that this was a reliable informant that had been used on other occasions. Mr. Smith also testified that he had received reports from law enforcement officers and

citizens in that area protesting the parole of Ellard. The exact date of the escape in 1971 was not known; however, the defendant's attorneys acknowledged that there had been an escape and that on the following day Mr. Ellard had been turned in by his attorney.

Before getting into the area of additional evidence in regards to the seriousness of the crime this subject's attorney made it known that if the evidence Mr. Smith gave was to be the same as his report of 4/24/81 he would submit this report for the record. This report was submitted marked Exhibit #6. It was admitted that this report will contain information outlining details of the offense that were not contained in the preliminary investigation in March, 1972.

Mr. David H. Williams, Executive Director, Board of Pardons and Paroles, then testified that the Parole Board file contained extensive protests that were received after this individual's parole of March 2, 1981. He further stated that the Board had received numberous complaints from the Attorney General since that time. He also stated that the Board had received a censure by the House of Representatives of the State Legislature. He then stated there were numerous newspaper articles contained in the file reflecting protest of this parole.

At that time the defendant's attorneys were asked did they wish to have any witnesses. There were no witnesses; however, they introduced Exhibits #7, #8,

#9, #10, #11, #12, #13, #14, and #15 for the record. The substance of these exhibits were reflected on the individual's progress while in prison prior to parole. The attorneys emphasized that other than his escape in 1977, Ellard's prison record was good. They also brought out that he was recommended for parole by the warden and the institutional parole officer. It is my understanding that these exhibits were introduced to reflect that the parole hearing had been conducted in accordance with the law.

FINDINGS:

The purpose of this hearing was not to determine the legality or constitutionality of the return of Mr. Ellard to the State of Alabama. It was to insure due process and to determine whether or not the evidence in this case presented probable cause to the hearing officer.

After hearing the testimony of the witnesses and examining the evidence submitted it is the hearing officer's opinion that sufficient probable cause exists to refer this case to the Parole Board for further consideration. I find probable cause in Sections 1, 2, 2-a, 3, 3-a, 3-b, 3-c, 4, 4-a, 4-b, 4-c, 4-d, and 4-e of Exhibit #4.

Sections 2-c, 2-d, 2-e, and 3-d were not examined at this hearing. This does not indicate that no probable cause exists but that, for the purposes of this hearing, these areas were not examined. Section 2-d was considered as a part of

the overall evidence that has been noted in the file.

Done this the 14th day of May, 1981, in Troy, Alabama.

/S/ KENNETH LAW

KENNETH LAW
District Supervisor
State Parole & Probation Offices
209 County Court House
Troy, Alabama 36081

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and, as one of the Attorneys for the Petitioners, I hereby certify on this _____day of November, 1987, I did serve the requisite number of copies of the foregoing on the Attorney for Richard Mark Ellard, Respondent, by mailing the same to said Attorney, first-class postage prepaid and addressed as follows:

Honorable Ralph I. Knowles, Jr.
Attorney at Law
P. O. Box 86
Tuscaloosa, Alabama 35402

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

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Alabama State House
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(205) 261 7300

FILED
DEC 15 1987
CLERK

NO. 87-849

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

ALABAMA BOARD OF PARDONS AND PAROLES, EALON M. LAMBERT, JOHN THOMAS PORTER, and RAY MORROW, Members of the Board of Pardons and Paroles of the State of Alabama, and the STATE OF ALABAMA,

PETITIONERS,

VS.

RICHARD MARK ELLARD,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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NO. 87-849

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

ALABAMA BOARD OF PARDONS AND PAROLES,
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and RAY MORROW, Members of the Board of
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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Richard Mark Ellard, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 824 F.2d 937.

QUESTION PRESENTED

Did a constitutionally protected liberty interest arise from Alabama's statutory scheme which placed particularized standards and criteria on its parole board's ability to revoke an executed parole?

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STATEMENT OF THE CASE

Richard Mark Ellard entered a plea of guilty to a charge of murder in the first degree and assault with intent to murder in 1972 in Blount County, Alabama. He received a sentence of life plus twenty years. He subsequently received an additional life sentence on a plea of guilty to murder in Georgia to run concurrent with the Alabama life sentence. (D. 19, pp. 1, 2).[1]

Ellard began serving his sentence in Alabama but was granted a parole from Alabama custody on March 2, 1981. He was issued a Certificate of Parole from the Alabama Board of Pardons and Paroles (hereinafter, "the Board") which explicitly stated that he was "released" subject only to not violating "the specific conditions of parole" listed on the certificate. (D. 19, p. 2; D. 5, Exh. A, p. 22). Upon his physical release from Alabama custody, he began to serve his separate sentence in Georgia's prisons. (D. 19, p. 4). Ellard never violated any of the conditions of his parole. (D. 5, Exh. A., pp. 20, 21).

Subsequent to the granting of the parole, public opinion was brought against the Board for its action in paroling Ellard. (D. 19, p. 3). The Board asked Attorney General Charles Graddick if it could revoke a parole "which had been legally issued and executed." Graddick not only opined that it could but instructed the Board's members to "reconsider and revoke the parole granted." (D. 19, p. 3; D. 5, Exh. A, p. 4).

On July 15, 1982, the Alabama Board of Pardons and Paroles ordered the revocation of Ellard's parole even though he had violated none of its conditions. The only "reasons" given for the revocation were "Attorney General's Opinion dated 4/17/81"

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[1]References to the original record will be in parentheses and will refer to the docket number and the page number of the submission where important. E.g., (D. 10, p. 6). References to th Appendices will be in parentheses with parts "A" through "E" referring to the Appendix of the Petitioner and "F" through "H" referring to the Appendix of the Respondent.

and "New Evidence Submitted." (D. 19, p. 3; D. 5, Exh. A, pp. 1, 20). As a result thereof, instead of having his conditional liberty from Alabama prisons, Ellard was returned to the prisons of Georgia with a detainer from Alabama that will require him to serve his life plus twenty years in Alabama prisons should he be released from Georgia custody. (D. 19, p. 3).

The Alabama statutory scheme related to paroles and revocations thereof is found in § 15-22-1 through § 15-22-40 Code of Alabama (Appendix C, F).[2] This statutory scheme places particularized standards and criteria on the Parole Board's authority to revoke a parole it has granted. It explicitly states that "the limitations and restrictions on the powers of the board or the members thereof shall be strictly construed." § 15-22-38. The authority of the Board to revoke or take back a parole is limited to circumstances (1) under which the parolee has violated a condition of his parole; or (2) the parole was void ab initio due to the failure of the parole board to follow statutory requirements in granting parole. §§ 15-22-29 and 32; § 15-22-40.

Subsequent to the revocation of his parole, Ellard challenged that decision in the Alabama courts asserting, inter alia, that his federal constitutional rights to substantive due process, procedural due process, and equal protection were violated by the revocation. The Supreme Court of Alabama, in a sharply divided five to four decision, denied Ellard relief. The majority decision recognized that Ellard had been duly paroled from Alabama custody and that his parole could not be revoked without a "due process hearing." Ex parte Ellard, 474 So.2d at 759-60 (Ala. 1985). Nonetheless, the majority determined, under

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[2] § 15-22-24 was broadly amended by the Alabama legislature in 1982 to add subsections (c) through (j). Thus, at the time of Ellard's parole, § 15-22-24(i) did not exist and there was no authority for the Board to transfer a prisoner to serve a sentence in another jurisdiction with a detainer for the rest of the Alabama sentence. (Appendix C, F).

a federal law analysis, that the Parole Board had the "inherent authority" to rescind its action if it determined it had made a mistake in carrying out its duties. It did not base its decision upon a state law interpretation of the authority granted the parole board under Alabama law. Ex parte Ellard, 474 So.2d at 760-763.

Ellard then filed his federal Petition for Habeas Corpus. That Petition again raised issues of substantive due process, procedural due process, and equal protection. The district court summarily, and without a full record, denied relief to Ellard but limited its consideration to what the State asserted was "the federal question" as stated in brief:

> This case presents only one federal question ... Does a convict have a constitutionally protected interest in a parole, which does not have the effect of placing him at large in the free world.

(Appendix A, p. 18).

There is no factual dispute that Ellard was incarcerated in Georgia's prisons to serve his Georgia sentence upon his release on parole from Alabama's custody. (D. 19, p. 3).

The Recommendation of the Magistrate adopted this position of the State as:

> the simple issue in this case and that is whether or not under federal law, Richard Mark Ellard was entitled to the protection of due process of law when the Board revoked a parole which in the opinion of the Magistrate, had ill-advisedly been granted to Ellard.

(Appendix A, p. 18).

The Magistrate then found as a matter of law that Ellard had no due process rights because Ellard had been taken to the Georgia prison system based on a detainer when he was released from Alabama custody. (Appendix A, pp. 19-20).

Based upon that finding of no due process interest, the Magistrate concluded that Ellard had no equal protection interest either. (Appendix A, p. 2).

The district court, over the timely filed objections of Ellard, adopted the opinion of the Magistrate and held:

> Where, as here, the Petitioner has not received any liberties because of the parole and the possibility of future liberty is purely speculative this Court is not of the opinion that a liberty interest is at stake.

(Appendix A, p. 6).

The Eleventh Circuit found it unnecessary to determine whether Ellard had a protected liberty interest arising solely from the due process clause itself since he had a liberty interest arising from the Alabama statutes. Ellard v. Alabama Board of Pardons and Paroles, 824 F.2d 937, 943-944 (11th Cir. 1987). It consequently reversed the case and remanded it to the district court for a determination as to whether Ellard's substantive and procedural due process rights (as well as his rights under the equal protection clause) were violated by the revocation of his parole. Ellard, 824 F.2d at 946.

SUMMARY OF ARGUMENT

This case is not worthy of consideration by this Court under Rule 17. Contrary to the Rule 17 bases cited by the state, the Eleventh Circuit opinion below applied settled principles of federal constitutional law to unambiguous Alabama statutes which have now been amended so that the unique facts involved are extremely unlikely to recur. See, e.g., § 15-22-24(i), Code of Alabama.

The State poses the primary issue as being whether or not Ellard had a "constitutionally protected liberty interest" in his parole. Since at least 1981, it has been clear that a constitutionally protected liberty interest in a parole is created by a state statutory scheme which places substantive limitations on decision-maker discretion. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 466-467, 101 S.Ct. 2460, 2465-2466 (1981). This principle was strongly reiterated last term by the majority and dissenting opinions in Board of Pardons v. Allen, ___ U.S. ____, 1075 S.Ct. 2415, 2419-2422, 2423 (1987). See also, Olim v. Wakinekona, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747 (1983); Hewitt v. Helms, 459 U.S. 460, 472, 103 S.Ct. 864, 971 (1982); Vitek v. Jones, 445 U.S. 480, 489, 100 S.Ct. 1254, 1262 (1979); Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 11, 99 S.Ct. 2100, 2106 (1979). The Court of Appeals simply applied this principle to the Alabama statutory scheme which provided that once the Parole Board had granted a parole, that Board's discretion to return Ellard to Alabama's prisons was limited to two circumstances: (1) a violation of the terms of parole, § 15-22-32, Code of Alabama; or (2) if the parole is deemed void due to the failure of the parole board to follow the state statutory requirements in granting parole. § 15-22-40; Ellard v. Alabama Board of Pardons and Paroles, 824 F.2d at 943, 944.

It is further well settled that once a liberty or property interest has been created by state law, the substantive and procedural process which flows from that protected interest is determined by federal law. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 540-42, 105 S.Ct. 1492-93 (1985) (property interest); Vitek v. Jones, 445 U.S. at 490-91, 100 S.Ct. at 1262-63 (1979) (liberty interest).

Since the District Court denied Ellard's claim summarily and on the pleadings based solely upon its erroneous determination that Ellard had no constitutionally protected liberty interest, this case was properly reversed and remanded for an evidentiary hearing on all issues.

ARGUMENT

I. THIS CASE DOES NOT PRESENT QUESTIONS OF (1) WHETHER A PROTECTED LIBERTY INTEREST IS CREATED BY A "MERE INTERSTATE TRANSFER" OF A PRISONER; (2) WHETHER A PROTECTED LIBERTY INTEREST ARISES FROM THE DUE PROCESS CLAUSE ITSELF BY "ANY PAROLE"; OR (3) WHETHER A FEDERAL COURT IS BOUND BY A STATE COURT INTERPRETATION OF STATE LAW.

This case exemplifies what can happen when a state attempts to create a legal basis for reversing a constitutionally protected but politically unpopular parole decision. In light of the arguments made by the Board and some erroneous statements of fact, it is important to first clarify what this case is not about.

This case in no way raises the issue of whether a state by merely linguistically designating as a parole an interstate transfer of a prisoner creates a liberty interest in that interstate transfer. Of course, if this were a case of a mere "interstate transfer", Ellard would have no protected liberty interest. Olim v. Wakinekona, 461 U.S. 238, 103 S.Ct. 1741 (1983); Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2632 (1976).

The Petitioner does not in this case claim a constitutionally protected liberty interest in a "mere interstate transfer." Yet, the Board continues to argue that this issue is present. In numerous instances in its Petition, from its Questions Presented through its arguments, the Board incorrectly says or implies in one manner or another that such is the case. (Petition for Writ of Certiorari, pp. I, 3, 6, 9 fnte. 2, 12, 13, 18, 20, 33, 42, 44, 49-50).

The Board further confuses this issue by its continuing reference to § 15-22-24(i), Code of Alabama, as if it were in existence and available for the Board to have utilized when Ellard was granted his parole from Alabama's custody in 1981. That section of the Code provides for the Board to transfer an Alabama prisoner to "any other jurisdiction ... in response to

a properly filed detainer" and provides that upon satisfaction of the detainer, the prisoner shall not be released without further order of the Board. However, § 15-22-24(i) was enacted after Ellard's parole on March 2, 1981 and was not effective until March 30, 1982. For the Board to argue that the constitutional validity of such a statute is worthy of consideration by this Court because it is novel and the Court "has never had occasion to address the liberty interest issue in the context of an interstate prison transfer by parole" is disingenuous at best.[3] (Petition for Certiorari, pp. 30. See also, Petition for Certiorari, pp. 6, 12-13, 20, 49-50).

Similarly, there is simply no basis for the Board to state in its "Questions Presented" that Ellard's parole "has no effect on the prisoner or his sentences, except to transfer him to the other state's prisons".

The Board's own actions precipitating this litigation belie the argument. Ellard was conditionally released from the custody of Alabama's prisons when he was given a plain old standard parole under Alabama law. Compare, Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972). If that parole was valid he could not ever be returned to Alabama's prisons unless he violated a condition of his parole. Conversely, if the action of

---

[3]The prominent reliance upon § 15-22-24(i) is even more curious in light of the Board's acknowledgment in a brief filed in the Supreme Court of Alabama in this case that "this statute has no place in this litigation, for the simple reason that such was not enacted until about one year after the Ellard parole." (Appendix H).

§ 15-22-24(i) in any event does not provide for a "parole" of any kind but provides for an interstate transfer by the Board of Pardons and Paroles.

The Petition also asserts at pp. 27-28 and 44 that this Court should grant certiorari in this case because there is "wide spread use of parole for interstate prison transfers." Facts supporting this statement and its corollary implication that states expect the return of such prisoners to their prisons without a violation of conditions of parole are not in the record in this case.

the Board which the Attorney General demanded be taken back resulted only in Ellard serving his Alabama sentence in Georgia until released at which time he would automatically be reincarcerated in Alabama prisons for the rest of the Alabama sentence, then no action--much less the ones in this case--would have been taken by the Attorney General or the Board.

The position of the Board in its original "Statement of the Facts" filed in the Circuit Court of Montgomery County, Alabama follows:

> On or about March 2, 1980, the Parole Board attempted to grant or granted the Petitioner a parole, which had the immediate effect of releasing the Petitioner to Georgia's prison authorities. The ultimate effect of this parole would be to put the Petitioner at large on parole should his Georgia sentence ever be set aside or if he should ever be paroled or pardoned by Georgia.
>
> (D. 12, Exh. A).

The remarks of the Attorney General Graddick at Ellard's "revocation hearing" are also telling:

> I have studied it, and to my knowledge, there are no degrees of or categories of parole in this State. I have never heard of a parole to the streets or a parole to detainer or parole to Georgia. You are paroled, if you are paroled, period. And we, I think, we can agree to that. Now, if you parole someone and there is a detainer in another state, then the only way we can be assured that that individual is going to the other state, is if that other state wants him. If they don't the parole means he goes to the streets.
>
> (D. 12, p. 15).

The entire Supreme Court of Alabama recognized throughout its majority and dissenting opinions that Mark Ellard had been paroled and that the parole could not be revoked "without due process." Ex parte Ellard, 474 So.2d 758, 763, 766 (Ala. 1985).[4]

---

[4]The Board cites to the opinion of the Alabama Court of Criminal Appeals which was bottomed on its finding that Ellard could not be "paroled to a detainer" and, therefore, that he was not paroled by the action of the parole board which was only an interstate transfer. Ellard v. State, 474 So.2d 743, 752-753 (Ala. Cr. App. 1984). As stated above, this finding was rejected
(Footnote Cont'd.)

The "mere interstate transfer" argument at the core of the Board's asserted basis for believing certiorari should be granted cannot credibly be made in this case.

Second, this case does not now present an issue of whether the execution of "any parole" creates a protected liberty interest arising out of the due process clause itself. As is indicated above, much of the Board's argument for certiorari review relates to the nature of Richard Mark Ellard's interest in his parole in comparison with that of the parolee in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972). Petition, pp. 34-44. This might be probative if the Eleventh Circuit had determined that Ellard had a liberty interest "inherently deserving of protection" arising out of the due process clause itself. It explicitly did not decide that issue. Ellard, 824 F.2d at 941, 942; see Argument II, infra.

Third, this is not a case which turns upon a question of whether a state court's interpretation of a state statutory scheme is controlling on a federal court. The highest court of Alabama and the Eleventh Circuit Court of Appeals agree that Richard Mark Ellard was paroled and that due process attached to that parole. Ex parte Ellard, 474 So.2d at 763; Ellard, 824 F.2d at 943-945. See also, Argument II, infra.

(Footnote Cont'd.)
by the Supreme Court of Alabama. The four justice dissenting opinion found the mere transfer argument to be "a frivolous argument in that every relevant document, including a signed and sealed Certificate of parole, indicates that Ellard was to be paroled, not transferred." Ex parte Ellard, 474 So.2d at 766.

II. THE COURT OF APPEALS APPLIED SETTLED PRINCIPLES OF LAW IN FINDING A CONSTITUTIONALLY PROTECTED LIBERTY INTEREST IN RICHARD MARK ELLARD'S PAROLE.

The Board recognizes as "hornbook law" that once a liberty interest "has been created by state law and become vested in a person" then that liberty interest is protected by the Fourteenth Amendment federal law due process clause. Petition at 48.[5] If a liberty interest was created by state law, then the Eleventh Circuit appropriately remanded the case for a determination as to what due process rights flowed from that protected liberty interest to Ellard.[6]

The analysis of the Eleventh Circuit and its limited conclusions in this case are mandated by what is now settled law from this Court.

There can be no doubt that citizens can receive constitutionally protected liberty interests either from the due process clause itself or from the laws of the state. Hewitt v. Helms, 459 U.S. 460, 466; 103 S.Ct. 864, 869 (1982).[7] The analysis to be applied in determining whether a due process interest arises out of state law is extensively explicated in the majority decision and the dissenting opinion in Board of Pardons v. Allen, ___ U.S. ___, 107 S.Ct. 2415 (1987), decided last term. The dissenting Justices in Allen thought that the Montana statutory parole scheme gave such discretion to the Board in granting

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[5]Although Ellard also urged reversal in the Eleventh Circuit based upon a liberty interest arising from the due process clause itself, the Court determined it was unnecessary to decide that issue in light of Ellard's liberty interest arising out of state law. Ellard, 824 F.2d at 942.

[6]Ellard's equal protection claim was also appropriately remanded for determination since the District Court denied it based upon its finding of no liberty interest. Ellard, 824 F.2d at 946, fnte. 12.

[7]The Petition sets up a straw issue by intermingling analysis which might be appropriate if the Court of Appeals had found a liberty interest arising out of the due process clause itself.

parole that there was no entitlement created from which sprung a protected liberty interest. But, the entire Court agreed that if a statutory scheme places "real limits" or "substantive limitations" on "decision maker discretion" then there is a liberty interest created. Allen, ___ U.S. at ___, 107 S.Ct. at 2422, 2423. This explicit standard has been applicable since at least 1981, Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 101 S.Ct. 2460 (1981). In Olim v. Wakinekona, 461 U.S. 238, 249, 103 S.Ct. 1741, 1747 (1983), the Court adopted language from Justice Brennan's concurring opinion in Dumschat and said that an inmate must show "that particularized standards or criteria guide the State's decision maker" in order to have a constitutionally protected liberty interest arising from state law. The Court further found that if state regulations "place no substantive limitations on official discretion" then no liberty interest arises out of the statutory scheme. Olim, 461 U.S. at 249, 103 S.Ct. at 1747.

In applying these settled principles to the Alabama statutory scheme, the Eleventh Circuit reached the "unexceptionable" conclusion that the Board was "constrained by 'substantive limitations' on its authority to rescind" Ellard's parole. Ellard, 824 F.2d 937, 942, 944; Vitek, 445 U.S. at 490, 100 S.Ct. at 490.

The Alabama parole statutory scheme on the date of Ellard's parole placed both real, substantial, and particularized limitations on the discretion of the Board to revoke or take back a parole. §§ 15-22-1 through 40.[8]

§ 15-22-38 explicitly limits the Board by stating starkly:

> The duties imposed upon the members of the board of pardons and paroles by this article are mandatory, and the limitations and restrictions on the powers of the board or the members thereof shall be strictly construed.

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[8]Again, the 1982 amendment to § 15-22-24 added new subsections (c) through (j) which were not previously a part of the statutory scheme. § 15-22-24(i) is, therefore, irrelevant to this proceeding. (Appendix C, F).

The only circumstance under which the Board can revoke a parole is if the parolee violates a condition of his parole as is specified in his certificate of parole. § 15-22-29 and 32. § 15-22-40 also provides that a parole made contrary to the provisions of the statutory scheme shall be null and void. Under no other circumstance does the scheme allow for the taking back of a parole.[9]

The Board has no discretion here but is severely and explicitly limited creating a protected liberty interest as the Eleventh Circuit found. The Board argues that the Eleventh Circuit should have ignored the statutory scheme as it asserts that federal courts are bound by the decision of the Alabama Supreme Court that Ellard's parole could be taken back after he was given due process if the Board determined it made a mistake in carrying out its duties. Ex parte Ellard, 474 So.2d at 763. However, the Board grossly misconstrues the import of that decision. First, in spite of some inexact language of the court, the decision implicitly recognizes that Ellard had a liberty interest. Ellard, 824 F.2d at 944, 945. Otherwise, axiomatically, no process would be due. Second, and more importantly here, the Court's analysis was an analysis of what could be done under federal constitutional law consistent with due process under Alabama's statutory scheme--not what the statutory scheme said or meant. The conclusions of the Alabama Supreme Court were

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[9]The statutory scheme in no way distinguishes between paroles from Alabama's prisons. The liberty interest created here by state law is not dependent upon whether the parolee has a detainer upon him from another jurisdiction or not. Thus, the Board's arguments attempting to distinguish due process implications of paroles to the street, as opposed to paroles when a parolee has detainer, are not only erroneous but inapt since the Eleventh Circuit decision did not rely on a liberty interest arising from the due process clause itself. Compare, e.g., Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972), and Board of Pardons v. Allen, ___ U.S.___, 107 S.Ct. 2415 (1987).

based totally upon the federal due process analysis of a Second Circuit Court of Appeals case which is not on point. Tracy v. Salamack, 440 F.Supp. 930 (S.D.N.Y. 1977), modified and affirmed, Tracy v. Salamack, 572 F.2d 393 (2nd Cir. 1978). That case involved whether the State of New York could amend its work-release laws so as to cause certain classes of prisoners in the work-release program to be taken back into the main prisons. Ellard was granted a parole and that parole was not revoked pursuant to any new statute of general application.[10] Nonetheless, the Salamack case found a federally protected liberty interest created by the New York laws. Ex parte Ellard, 474 So.2d at 761. This only confirms that the Alabama Supreme Court analysis was not based upon state statutory interpretation but was rather based on federal constitutional law which required it to find that Ellard had a liberty interest protected by the due process clause. Ex parte Ellard, 474 So.2d at 763.

Since the District Court summarily dismissed Ellard's claim based upon its erroneous finding of no liberty interest, the only proper course of action for the Eleventh Circuit was to reverse the case and remand it for the District Court to determine what process was due, which is also a federal question governed by federal law. See, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 540-42, 105 S.Ct. 1492-93 (1985) (property interest); Vitek v. Jones, 445 U.S. at 490-91, 100 S.Ct. at 1262-63 (1979) (liberty interest).

---

[10]Such a hypothetical revocation of Ellard's executed parole would invoke other constitutional questions not involved in this Petition. See, Bearden v. Georgia, 461 U.S. 660, 665, 103 S.Ct. 2064, 2069, fnte. 7 (1983).

CONCLUSION

The effort of the Board to present the case as an appropriate case for review under Rule 17 must fail. Stripped of the arguments based upon erroneous references to "mere interstate transfer" and the irrelevant § 15-22-24(i), Code of Alabama, this is a peculiar case based upon unique facts not likely to arise again and decided by the application of well-settled principles of federal constitutional law. It is not worthy of consideration of this Court under Rule 17.

Submitted by,

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that prior to filing the foregoing or immediately thereafter, I caused to be delivered a true and correct copy of same, United States postage prepaid and correctly addressed to Joseph G. L. Marston III, Assistant Attorney General of the State of Alabama.

Done this the 29th day of January, 1988.

Ralph I. Knowles, Jr.
ATTORNEY FOR RESPONDENT

AFFIDAVIT OF MAILING

To the best of my knowledge, this Brief in Opposition to the Petition for Writ of Certiorari has been placed in the United States Mail at 4:00 p.m. on the 29th day of January, 1988, correctly addressed to the Clerk of the United States Supreme Court and postage prepaid.

Ralph I. Knowles, Jr.

Sworn to and subscribed before me this 29th day of January, 1988.

Notary Public, State at Large

NO. 87-849

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

ALABAMA BOARD OF PARDONS AND PAROLES,
EALON M. LAMBERT, JOHN THOMAS PORTER,
and RAY MORROW, Members of the Board of
Pardons and Paroles of the State of Alabama,
and the STATE OF ALABAMA,

PETITIONERS,

VS.

RICHARD MARK ELLARD,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX
TO
RESPONDENT'S BRIEF IN OPPOSITION

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APPENDIX F:

CODE OF ALABAMA (1975)

ANNOTATION TO §§ 15-22-24

The 1982 amendment, effective March 30, 1982, inserted "hereinafter referred to as 'the board,'" in subsection (a), and added subsections (c) through (j).

APPENDIX G:

UNITED STATES CONSTITUTION

AMENDMENT XIV, § 1

[Citizenship Right Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H:

EXCERPTS FROM BOARD'S

SUPREME COURT OF ALABAMA BRIEF

IN THE SUPREME COURT OF ALABAMA

S. C. NO. 83-1352

EX PARTE: RICHARD MARK ELLARD,

IN RE: RICHARD MARK ELLARD

(PETITIONER)-APPELLANT

VS.

STATE OF ALABAMA, EALON M. LAMBERT JOHN THOMAS PORTER, JACK CURTIS LUFKIN INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF PARDONS AND PAROLES, AND JOSEPH HOPPER INDIVIDUALLY AND AS COMMISSIONER OF THE ALABAMA DEPARTMENT OF CORRECTIONS

(RESPONDENTS)-APPELLEES

AN APPEAL FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA (NO. CC 82-1216-K)

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA (3 DIV. 927)

BRIEF AND ARGUMENT OF APPELLEES IN REPLY TO THE AMICUS CURIAE

OF

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ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III
ASSISTANT ATTORNEY GENERAL

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IV.

SECTION 15-22-24(i), CODE OF ALABAMA, 1975, WAS NOT ENACTED AT THE TIME OF ELLARD'S PAROLE.

The Amicus complains primarily about a portion of the Court of Criminal Appeals opinion which discusses transfers under Section 15-22-24(i), Code of Alabama, 1975. The Respondents must agree with the Amicus that this statute has no place in this litigation, for the simple reason that such was not enacted until about one year after the Ellard parole.

The obvious purpose of Section 15-22-24(i) is to permit the Board to transfer prisoners to other jurisdictions without meeting the statutory requirements which it should have met but did not meet in the case of the Ellard parole. However, the Ellard parole was issued on March 2, 1981, and Section 15-22-24(i) did not become law until 3:00 p.m., March 30, 1982. Act 82-153, Acts of Alabama, 1982, pages 183-185.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 1985, I did serve copies of the foregoing on the Attorneys for the Petitioner-Appellant and the Amicus Curiae by mailing the same to them first-class postage prepaid and addressed as follows:

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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 87-849

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

ALABAMA BOARD OF PARDONS AND
PAROLES, EALON M. LAMBERT, JOHN
THOMAS PORTER, and RAY MORROW,
Members of the Board of Pardons
and Paroles of the State of
Alabama, and the
STATE OF ALABAMA,

PETITIONERS,

vs.

RICHARD MARK ELLARD,

RESPONDENT,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

REPLY BRIEF AND ARGUMENT OF PETITIONERS

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NO. 87-849

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ALABAMA BOARD OF PARDONS AND PAROLES, EALON M. LAMBERT, JOHN THOMAS PORTER, and RAY MORROW, Members of the Board of Pardons and Paroles of the State of Alabama, and the

STATE OF ALABAMA,

PETITIONERS,

vs.

RICHARD MARK ELLARD,

RESPONDANT,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF AND ARGUMENT OF PETITIONERS

I.

IN RE: LIBERTY INTEREST

The respondent argues that Section 15-22-24(i), Code of Alabama, 1975, was not passed until after his parole was

issued. See pages 12-13 of the Petition. Obviously, the Court of Criminal Appeals took this statute as codifying the Board's established practice, since the Board did not cite this statute to the Court of Criminal Appeals. This, however, is a state law issue.

The issue here is simple: whether a parole which does not affect the rate of service of concurrant sentences from different states and does not effect the convict's release to the free world but does affect the place where he serves the sentences, create a liberty interest within the meaning of the Consitution of the United States? This issue has been decided in this litigation in the negative by most of the courts which have reviewed it, but a majority of a panel of the Court of Appeals decided otherwise. How can the Respondent argue that this is not an issue in this case?

II.

IN RE: THE REJECTION OF THE STATE COURT INTERPRETATIONS OF STATE STATUTES

The petition points out that the divided panel of the Court of Appeals engaged in a detailed review of the state court interpretations of Alabama's parole statutes and, except for a single point, rejected them in favor of its own views. In so doing the panel ruled contrary to a two hundred year old policy of this Honorable Court, which had been re-affirmed and extended just a year before.[1] Now, the Respondent argues that the panel's action was justified in light of a point of state law, but the state courts ruled against the Respondent

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1. Posadas de P.R Asso. v. Tourism Co. of P.R. 478 U.S. ___, 92 L.Ed.2d 266, 106 S.Ct. 2968 (1966)

on this point, and this was the only point on which the Eleventh Circuit agreed with the state courts!

The issue here is separate from that of liberty interest. If the District Court erred in finding no liberty interest, the case ought to be remanded, but only to review the procedures by which the void parole was nullified,[2] not to review the relative merits of the Board's decision. The District Court would review the evidence before the Board only to determine if there is some evidence to support the Board's finding. If the District Court found a denial of procedural due process, it would issue

---

2. It is undisputed that the Parole Board believed that it was required to comply with Morrissey v. Brewer (408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 [1972]) and edeavored to do so.

the writ, commanding that the procedural requirements be met, not issuing a parole.[3]

What gives rise to this second issue is the fact that the divided panel did not stop with remanding the cause for review of the procedures but ordered a review of the merits based on a totally new interpretation of the state statutes. The Petitioner says that the Court of

---

3."...[w]e conclude the ends of justice will be best served by remanding the case to...the District Court with directions to make findings on the procedures actually followed by the Parole Board in these two revocations. If it is determined that petitioners admitted parole violations to the Parole Board, as Iowa contends, and if those violations are found to be reasonable grounds for revoking parole under state standards, that would end the matter. If the procedures followed by the Parole Board are found to meet the standards laid down in this opinion that, too, would dispose of the due process claims for these cases...." (Morrissey v. Brewer 408 U.S. 471, 490, 33 L.Ed.2d 484, 499-500, 92 S.Ct. 2593 [1972]; emphasis supplied)

Appeals was authorized to do this because Alabama parole statutes place "particularized standards and criteria on its parole board's ability to revoke" void paroles. The only standard expressly mentioned by Alabama's statutes for a parole's being void is that it was "...granted...contrary to the provisions of this article [i.e. the parole statutes]'...." Section 15-22-40, Code of Alabama, 1975. The standards are, then, the provisions of the Alabama parole statutes, and the issue is: What do these provisions mean, i.e. What they say, as held by the state courts, or something else, as held by the divided panel. The issue presented by the Petition is whether the Court of Appeals was authorized to impose these new interpretations on these statutes.

The argument presented by the Respondent in this Court was advanced by him in the State courts for the proposition that the Alabama Parole Board was not authorized to nullify a void parole.[7] The argument was rejected by the state courts and, on this one point, the Court of Appeals agreed.

The Respondent frankly acknowleges that the divided panel of the Court of Appeals rejected the state court interpretations of what Alabama's parole statutes say and substituted their own ideas of what the statutes ought to say.

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7. The Alabama statutes make no express provision for nullifying void paroles. In state court the Board argued that the power to nullify void orders is inherent in an administrative agency. 2 Am.Jur.2d, Administrative Law, Section 524; 73 A.L.R.2d 951, Section 5 The Board argued also that nullifying a void parole was analogous to a court's correcting a void sentence United States v. DiFancesco 449 U.S. 117, 66 L.Ed.2d 328, 101 S.Ct. 426 (1980); Murphy v. Massachusetts 177 U.S. 155, 44 L.Ed. 711, 20 S.Ct. 639 (1900)

This is a power which this Honorable Court has always held that it did not have. The issue here is then very simple: Does a United States Court of Appeals enjoy powers which are denied to this Honorable Court?

CONCLUSION

In conclusion, the Petitioners again respectfully submit that the Court of Appeals decided a novel question in a manner inconsistent with this Court's rulings and decided settled questions contrary to the policy of this Honorable Court. Therefore, the writ should issue, and the Petitioners again so pray.

Respectfully submitted,

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BY-

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CERTIFICATE OF SERVICE

I, Joseph F. L. Marston, III, an Assistant Attorney General of Alabama, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and, as one of the Attorneys for the Petitioners, I hereby certify on this 5th day of February, 1988, I did serve the requisite number of copies of the foregoing on the Attorney for Richard Mark Ellard, Respondent, by mailing the same to said Attorney, first-class postage prepaid and addressed as follows:

Honorable Ralph I. Knowles, Jr.
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